

# Of Salmon, Salamander, and Lizards: Can State and Local Conservation Plans Preempt the Endangered Species Act

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## NOTE

### OF SALMON, SALAMANDER, AND LIZARDS: CAN STATE AND LOCAL CONSERVATION PLANS “PREEMPT” THE ENDANGERED SPECIES ACT?

*Malaiika M. Eaton*<sup>†</sup>

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## INTRODUCTION

One thousand two hundred and forty-six United States species<sup>1</sup> have either a threatened or endangered listing under the Endangered Species Act (ESA).<sup>2</sup> According to one reporter, “[a]pproximately 16 percent of species in the U.S. are in ‘immediate danger of extinction.’ Thirty-three percent of the animals and plants on the Endangered Species List are declining.”<sup>3</sup> Congress adopted the Endangered Species Act, the so-called “pit bull of environmental laws,”<sup>4</sup> to prevent the extinction of species after it found that species in the United States and abroad were becoming extinct.<sup>5</sup> In modern times, the “rate of petitioning for species to be protected under the Endangered Species Act is accelerating.”<sup>6</sup> The ESA, because of its broad protective provisions, can impact people from every walk of life in the United States.<sup>7</sup>

The United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) administer the ESA.<sup>8</sup> Under

<sup>1</sup> “The term ‘species’ includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Endangered Species Act of 1973, 16 U.S.C. § 1532(16) (1994).

<sup>2</sup> U.S. FISH & WILDLIFE SERV., THREATENED AND ENDANGERED SPECIES SYSTEM (TESS), at <http://ecos.fws.gov/tess/html/boxscore.html> (last visited Oct. 11, 2001). See generally Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (1994 & Supp. V 1999) (establishing statutory parameters for threatened and endangered classifications).

<sup>3</sup> Elizabeth Grossman, *Species on the Brink of a Nervous Breakdown: A Record Pace of Extinction Threatens American Flora and Fauna*, GRIST MAG., Sept. 19, 2000, at 2 (quoting DAVID S. WILCOVE, *THE CONDOR’S SHADOW: THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA* 231 (1999)), at <http://www.gristmagazine.com/grist/books/books091900.stm>.

<sup>4</sup> Nancy K. Kubasek et al., *Cross-Examining Market Approaches to Protecting Endangered Species*, 30 ENVTL. L. REP. (Envtl. L. Inst.) 10,721, 10,721 (Sept. 2000) (citing Oliver A. Houck, *Reflections on the Endangered Species Act*, 25 ENVTL. L. 689, 691 (1995)).

<sup>5</sup> See 16 U.S.C. § 1531(a).

<sup>6</sup> Todd Wilkinson, *Nature’s Next Crisis: Islandization*, CHRISTIAN SCI. MONITOR, Jan. 20, 2000, at 3.

<sup>7</sup> See Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 344–45 (1997) (“[A]ny property holder who currently farms his land, utilizes it for extractive purposes, or contemplates making improvements in the future must worry about the ESA. . . . The ESA, in short, is every property owner’s nightmare.”); see also Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375, 2380–81 (2000) (stating that property rights advocates were effective in conveying “that the ESA had an extraordinary potential to constrain economic activity”).

<sup>8</sup> See Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 GA. L. REV. 413, 415 (1999); Ryan M. Beaudoin, Comment, *Federal Ownership and Management of America’s Public Lands Through Land Exchanges*, 4 GREAT PLAINS NAT. RESOURCES J. 229, 250 (2000) (stating that “[t]he [FWS], under the Secretary of the Interior, has been given the authority to administer the ESA with regard to land animals” and that “[t]he [NMFS], under the Secretary of Commerce, has been given the authority to administer the [ESA] for many of the fish found in the Northwest United States as well as

particular statutory guidelines, these agencies must decide whether to list a species as either threatened<sup>9</sup> or endangered<sup>10</sup> on the basis of the best scientific evidence.<sup>11</sup> Once an agency lists a species as either threatened or endangered, several statutory and regulatory requirements come into effect, including limits on alteration of that species' habitat and other actions that may adversely affect the species.<sup>12</sup>

According to one commentator, "the list [of protected species under the ESA] has grown explosively over the past 30 years; today it includes more than 1,200 U.S. and 550 foreign species."<sup>13</sup> Additionally, due to funding limitations, 245 species will remain on the candidate list,<sup>14</sup> waiting for the FWS to formally list them, for fiscal year 2001.<sup>15</sup>

States and individual property owners sometimes view the ESA as particularly burdensome because of the federally mandated restrictions on otherwise legal conduct, especially those restrictions impinging upon property owners such as restrictions on land clearing and construction.<sup>16</sup> As one commentator stated, "[t]he ESA, once the apple of Congress's eye, has become the whipping boy of property rights advocates, who portray it as the embodiment of a federal land use regulatory framework run amok."<sup>17</sup> In response to this sentiment, as well as to other influences such as the states' rights movement, several states have attempted to preempt an ESA listing process by adopting

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many other species found along the coast of the Pacific Ocean of the contiguous United States").

<sup>9</sup> "The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

<sup>10</sup> With an exception for pest species, "[t]he term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

<sup>11</sup> *Id.* § 1533(a)(1), (b)(1), (c).

<sup>12</sup> *Id.* § 1538.

<sup>13</sup> Holly Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation*, 30 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,434, 10,434 (June 2000).

<sup>14</sup> A candidate species is "any species being considered . . . for listing as an endangered or threatened species, but not yet the subject of a proposed rule." 50 C.F.R. § 424.02(b) (2000).

<sup>15</sup> Press Release, U.S. Fish & Wildlife Service, Flood of Court Orders Preclude [sic] New Listings of Threatened and Endangered Species in FY 2001 (Nov. 22, 2000) [hereinafter Press Release] (stating that the FWS "will not be able to consider the 245 species currently on the candidate list . . . for Endangered Species Act protection"), available at <http://news.fws.gov/newsreleases>.

<sup>16</sup> See Ortiz, *supra* note 8, at 414 ("The [ESA] as it has been implemented satisfies neither conservationists . . . nor property rights activists, who believe the Act has gone too far. . . . Property rights activists, distressed with this increased regulation at both the federal and the state level, have become more vocal." (citations omitted)).

<sup>17</sup> J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 *ENVTL. L.* 1107, 1137 (1995).

their own conservation plans.<sup>18</sup> Similarly, the agencies themselves have experienced a series of regulatory reforms designed to make the ESA more palatable, flexible, and friendly to states and property owners.<sup>19</sup>

The situation states, agencies, and the public face during the ESA listing process can be unsettling. Imagine a state official, faced with a species within state borders that is a candidate for listing under the ESA.<sup>20</sup> Political officials want to keep as much local control as possible yet recognize that existing state regulatory mechanisms are inadequate. After obtaining input from constituents, compromising with various political factions, coordinating with the NMFS, and creating a plan that includes appropriate scientific and technical input, the state adopts a local conservation plan. The plan is well publicized; state citizens depend upon it and adapt their behavior in reliance on the plan. Meanwhile, in a neighboring state, a similar process is evolving in relation to a different candidate species.

In response to the change in the state regulatory environment (one of the factors the NMFS must consider prior to listing a species),<sup>21</sup> the NMFS determines not to list the species. However, environmental advocacy groups and community organizations challenge this administrative determination in the federal courts. The district court overturns the NMFS's decision not to list the species and remands the case back to the agency for further consideration, or even orders the NMFS to list the species, concluding that the state must have adopted and implemented the plan for at least two years before

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<sup>18</sup> See discussion *infra* Part II.

<sup>19</sup> See Ortiz, *supra* note 8, at 418–19 (“In 1994, in an attempt to balance the competing interests involved in ESA implementation and to focus more energy on preventive care, the [FWS and the NMFS] began their own administrative overhaul of the Act, taking an ecosystem approach to species protection.”); see also Rebecca Cook, *Groups Sue Feds for Better Salmon Rules*, IDAHO STATESMAN, Sept. 13, 2000, at 9 (discussing the ESA rules and stating that the “rules [did] something new by giving local and state governments more flexibility” and that “[i]f [they] approve their own plans to regulate activities . . . the federal government will let them be ‘exempt’ from the . . . regulations”), LEXIS, Nexis Library, News Groupfile; Christine O. Gregoire & Robert K. Costello, *The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 WASH. L. REV. 697, 701 (1999) (“Because the ESA is a federal law that preempts inconsistent state laws, it can diminish the independence [people in the Pacific Northwest] have long cherished unless we take the initiative to recover and protect our salmon.”); Lynda V. Mapes, *Groups Sue over State’s Logging Law, Calling Exemption a Threat to Salmon*, SEATTLE TIMES, Sept. 13, 2000, at B3 (discussing “an innovative approach to salmon protection” the NMFS created and stating that the agency has “offered exemptions from federal rules implementing the [ESA] if local and state governments adopt their own, federally approved salmon protections”), 2000 WL 5554180; J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 372 (1998) (“The opening salvo in FWS’s administrative reform effort came in March 1994 with the agency’s publication of *An Ecosystem Approach to Fish and Wildlife Conservation*.”).

<sup>20</sup> See *supra* note 14 for an explanation of the term “candidate species.”

<sup>21</sup> 16 U.S.C. § 1533(b)(1)(A) (1994).

the NMFS may consider it. Obviously, the state officials, politicians, and the public are distressed. Their distress only worsens when, in the neighboring state, a second district court, faced with nearly the same situation, comes to the opposite conclusion. This inconsistent application of legal standards in the face of similar state and federal actions is indeed the current landscape for agencies, states, and the public when the NMFS or the FWS accepts a recently adopted state plan in lieu of an ESA listing.

Allowing states to essentially preempt an ESA listing when they adopt their own conservation plans presents problems and opportunities, both of which this Note will address. There are several potential problems: (1) local conservation plans may be less effective at protecting a species than an ESA listing; (2) states may adopt these plans as a prophylactic to avoid listing without committing the necessary resources—political or otherwise—into following through; (3) inconsistent approaches may promote confusion; and (4) the federal agencies may wish to use such plans to avoid listing for political or resource-related reasons<sup>22</sup> not connected to the best interests of the species. However, if states design locally adopted plans with the stringent requirements of the ESA in mind, and if those plans have local support, they may be more effective in the long run, because local individuals will be more likely to buy into a plan their home state administers.<sup>23</sup> Additionally, states may make better use of local expertise and adopt plans designed to avoid potential problems and take advantage of opportunities. For example, states may have powers outside the range of the federal agencies to adopt measures not allowed under the ESA but nonetheless helpful to the long-term viability of the species.<sup>24</sup> Allowing states to take the driver's seat will allow the federal agencies to use their limited resources in areas in which there is less state coopera-

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<sup>22</sup> For example, in January 2001, the FWS announced that "the need to take higher-priority listing actions first" precluded the listing of twenty-one species for which it had received petitions for listing (and that still warrant listing) and the reclassification of an additional five species from threatened to endangered states. Press Release, U.S. Fish & Wildlife Service, Service Announces Results of Annual Review of Findings on Petitioned Species Awaiting Action Under the Endangered Species Act (Jan. 8, 2001), *available at* <http://news.fws.gov/newsreleases>.

<sup>23</sup> See Cook, *supra* note 19, at 9.

<sup>24</sup> "[The] NMFS strongly encourages comprehensive conservation planning for programs at the state level. State level conservation programs can be one of the most efficient methods to implement effective conservation practices across the board and achieve comprehensive benefits for listed fish and their habitats." Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), 65 Fed. Reg. 42,422, 42,424 (July 10, 2000) (to be codified at 50 C.F.R. pt. 223) (discussing state programs to protect salmon ESUs).

tion.<sup>25</sup> Finally, the flexibility inherent in local plans compared to the ESA offers an additional advantage.<sup>26</sup>

Part I of this Note will discuss the background and history of the ESA provisions relating to local conservation plans. It will also outline the current trends in several states toward adopting these plans and discuss the agencies' adaptation of the statutory language to fit the current political realities. Part II will discuss the current use of local conservation plans and how they have fared in the court system in various jurisdictions. The case studies included are those state plans that have faced litigation in the court system, and thus present the breadth of court commentary on the validity of local conservation plans. Part III integrates the requirements courts have imposed upon local conservation plans and discusses how these requirements will help or hinder the ESA's fundamental purpose. Part IV concludes with recommendations for a consistent approach to local conservation plans. Specifically, courts or agencies should not impose an inflexible standard for the necessary length of time for which the state must have implemented its plan before an agency may rely upon that plan in determining not to list a species. Nor should the courts or agencies impose no standard at all. Instead, the standard should be flexible and based upon the apparent threats to the species, how long these threats have been apparent, and the likelihood that the plan will be an effective substitute for ESA protections. In making their determinations, agencies must rely on measures that are enforceable, not voluntary,<sup>27</sup> and otherwise consistent with the purpose of the ESA. This

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<sup>25</sup> See Ortiz, *supra* note 8, at 421; see also Press Release, *supra* note 15 (stating that the FWS will only complete emergency listings until after fiscal year 2001 because it must use its already-limited funding to complete court-mandated critical habitat designations, and that the FWS has designated critical habitat for only 134 species out of the 1,234 listed species).

<sup>26</sup> See Christine Golightly, Note, *The Oregon Coastal Salmon Restoration Initiative: A Flawed Attempt to Avoid ESA Listing*, 7 N.Y.U. ENVTL. L.J. 398, 445 (1999) (stating that state-implemented plans offer an advantage over federal protections under the ESA because federal plans can "only prohibit harmful activity" while state-implemented plans can "require beneficial efforts" such as replacing culverts to improve access to streams for salmon).

<sup>27</sup> It is important to clarify that this Note uses the term "voluntary" in a very particular sense. In the broadest sense of the term, all state plans are "voluntary" because the state legislature, absent extraordinary circumstances, can change them at any time. This Note does not use "voluntary" in this sense. Rather, this Note uses the term to mean actions that, once taken, are not in some way binding. For example, a state could enter into a contract with a landowner who, in exchange for money, will preserve habitat for endangered species. Although the landowner is acting voluntarily when she enters into the contract, once she accepts the terms and takes the money, she is bound to those commitments and will have difficulty escaping them. This would not be a voluntary state plan component (once it is implemented) under this Note's definition of the term. On the other hand, if a state, as a part of its local conservation plan, included nonbinding recommendations to landowners about habitat preservation, this component would be considered voluntary under this Note's definition of the term.

approach fits well within the traditional arbitrary and capricious review of agency action.<sup>28</sup>

## I

### THE ENDANGERED SPECIES ACT: THEN AND NOW

#### A. Early History of the Endangered Species Act<sup>29</sup>

Congress adopted the ESA in 1973 to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species."<sup>30</sup> The first half of the twentieth century had seen developments such as rapid population movement, expansion of agriculture, and growth of new cities.<sup>31</sup> Because of these types of pressures upon species, Congress found that some species in the United States had become "so depleted in numbers that they are in danger of . . . extinction"<sup>32</sup> and that others had been rendered "extinct as a consequence of economic growth and development untempered by adequate concern and conservation."<sup>33</sup>

The ESA lays out particular requirements for determining when a species is threatened or endangered.<sup>34</sup> In any listing decision, the agencies must consider several factors, as set forth by the statute:

- (A) the present or threatened destruction, modification, or curtailment of [a species's] habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.<sup>35</sup>

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<sup>28</sup> See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>29</sup> This Part will provide only a brief overview of the ESA's history and purpose. For a more extensive treatment of this topic, see MICHAEL J. BEAN, *ENVTL. DEF. FUND, THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1983); RICHARD LITTELL, *ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION* (1992); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

<sup>30</sup> 16 U.S.C. § 1531(b) (1994).

<sup>31</sup> David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 14 (2001).

<sup>32</sup> 16 U.S.C. § 1531(a)(2).

<sup>33</sup> *Id.* § 1531(a)(1).

<sup>34</sup> See *id.* § 1533(a)(1), (b).

<sup>35</sup> *Id.* § 1533(a)(1).



The presence of any one of these factors may justify listing a species as either threatened or endangered.<sup>36</sup> This Note primarily focuses on factor D, "the inadequacy of existing regulatory mechanisms."<sup>37</sup> Additionally, the ESA provides that the agencies must take into account "efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species."<sup>38</sup> This Note specifically focuses on the interaction of these two provisions.

The ESA grants power to the Secretary of the Interior and the Secretary of Commerce (and in specified areas, the Secretary of Agriculture) to authorize regulations to carry out its purposes.<sup>39</sup> For example, once the NMFS or the FWS designates a species as either threatened or endangered under the ESA, certain restrictions upon actions of individuals and agencies apply. If an agency lists a species as endangered, restrictions apply to importing, exporting, taking or interfering<sup>40</sup> with the species, possessing any part of the species, or selling any part of the species.<sup>41</sup> Because of the definitions of some of these terms, such as "take,"<sup>42</sup> the ESA prohibitions are exceptionally broad. The ESA requires the agency to develop a recovery plan<sup>43</sup> and

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* § 1533(a)(1)(D).

<sup>38</sup> *Id.* § 1533(b)(1)(A).

<sup>39</sup> *Id.* §§ 1532(15), 1533(a)(1). These Secretaries "in turn have delegated most of their responsibilities to the FWS and the [NMFS]." Doremus, *supra* note 13, at 10,435.

<sup>40</sup> See *infra* note 42.

<sup>41</sup> See 16 U.S.C. § 1538(a). Specifically, for endangered species of fish or wildlife, it is unlawful to:

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species . . . .

*Id.* § 1538(a)(1).

<sup>42</sup> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Agency regulations have defined the term "harm" as used in the definition of "take" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2000).

<sup>43</sup> 16 U.S.C. § 1533(f). A recovery plan includes:

designate critical habitat<sup>44</sup> in response to a listing of a species as threatened or endangered.

The ESA also establishes a particular scheme for how the state and federal systems will interact. Section 1535 governs cooperation between the state entities and the federal program.<sup>45</sup> The ESA states that the agencies must “cooperate to the maximum extent practicable with the [s]tates.”<sup>46</sup> Consistent with the ESA, the federal agencies may “consult[ ] with the [s]tates concerned before acquiring any land or water . . . for the purpose of conserving any endangered species or threatened species”<sup>47</sup> and “enter into agreements with any [s]tate for the administration and management of any area established for the conservation of endangered . . . or threatened species.”<sup>48</sup> Additionally, the agencies may “enter into a cooperative agreement . . . with any [s]tate which establishes and maintains an adequate and active program for the conservation of endangered . . . and threatened species.”<sup>49</sup> The first two provisions deal with the creation and maintenance of any lands used for ESA purposes; it is the third provision that is the focus of this Note.<sup>50</sup>

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- (i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species;
  - (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
  - (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.

*Id.* § 1533(f)(1)(B).

<sup>44</sup> *Id.* § 1533(b)(2). The ESA defines critical habitat as follows:

- (i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

*Id.* § 1532(5)(A). Except in those circumstances the Secretary determines, “critical habitat shall not include the entire geographical area” which the threatened or endangered species can occupy. *Id.* § 1532(5)(C).

<sup>45</sup> *Id.* § 1535.

<sup>46</sup> *Id.* § 1535(a).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 1535(b).

<sup>49</sup> *Id.* § 1535(c)(1).

<sup>50</sup> Significantly, by their terms, none of these provisions allow the agencies to enter into cooperative agreements with the states covering species that are not already designated as either threatened or endangered (that is, already under the protective umbrella of ESA provisions).

B. Agency Adaptation to Allow State and Local Conservation Plans

In the face of criticism (and a hostile Republican Congress), the agencies began a series of reforms, such as the "Safe Harbor Policy"<sup>51</sup> and the "No Surprises Policy,"<sup>52</sup> designed to make the ESA more palatable for property rights advocates and to improve its chances of reauthorization.<sup>53</sup> One such innovation was the FWS's adoption of the Candidate Conservation Agreement Policy, which "encourages landowners (both public and private) to enter into voluntary conservation agreements through economic incentives and the potential that conservation efforts will reduce the probability that listing will be required" for species that have not reached a stage requiring listing, but are nonetheless in decline.<sup>54</sup> Arguably, the ESA does not authorize these agreements because they apply to unlisted species and "[n]othing in the ESA specifically authorizes the [NMFS and the FWS] to enter into candidate conservation agreements, and little authority exists for the [NMFS's and the FWS's] direct regulation of unlisted species."<sup>55</sup>

Even if the ESA does authorize such agreements, these agreements were originally not a substitute for a listing, and the agencies would proceed to list a species if the voluntary measures proved insufficient.<sup>56</sup> However, the FWS "has . . . used [these agreements] to such a high degree that some commentators have accused the FWS of using the agreements as a replacement for the ESA's provisions for listing."<sup>57</sup> The NMFS strongly encourages state plans:

State and local efforts like the Oregon Plan for Salmon and Watersheds, the State of Washington's Extinction is Not an Option Plan,

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<sup>51</sup> See Kubasek et al., *supra* note 4, at 10,726. "Under a Safe Harbor Agreement, the FWS agrees to 'freeze' a landowner's responsibilities under the ESA if that landowner 'voluntarily undertake[s] management activities on [his or her] property to enhance, restore, or maintain habitat benefiting federally listed species.'" *Id.* (quoting Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706, 32,707 (June 17, 1999)).

<sup>52</sup> See *id.* at 10,727. "[T]his policy promises landowners that if they agree to participate in [a habitat conservation plan], they will not be saddled with further restrictions on their land use. This policy applies regardless of future developments affecting the species' chances of surviving." *Id.*

<sup>53</sup> See Ortiz, *supra* note 8, at 464-65; see also Sax, *supra* note 7, at 2381 (stating that "a new approach was critical to avoid a weakened reauthorization"). Note that the agencies have justified these new policies based on the "inherent flexibility of the ESA." Ortiz, *supra* note 8, at 488; see *id.* at 487-88.

<sup>54</sup> Ortiz, *supra* note 8, at 465.

<sup>55</sup> *Id.* at 488. See *id.* at 487-92 for a discussion of ESA provisions that may grant authority over unlisted species.

<sup>56</sup> See *id.* at 467-68.

<sup>57</sup> Kubasek et al., *supra* note 4, at 10,726 (citing Martha F. Phelps, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175, 187 (1997)).

Metro's Functional Plan, the Puget Sound Tri-County Initiative and Lower Columbia Fish Recovery Board in Washington State, the Eugene, Oregon-area Metro ESA Coordinating Team, and the Willamette Restoration Initiative (WRI) have stepped forward and assumed leadership roles in saving [salmon and steelhead] species. NMFS reiterates its support for these efforts and encourages them to resolve critical uncertainties and further develop their programs so they can take the place of blanket ESA take prohibitions.<sup>58</sup>

The NMFS's espousal of local plans that could supplant the ESA is clear.

A local conservation plan must meet one of two standards to fall within the provisions of the ESA. It must be adequate and active, and under the first standard it must satisfy the following five-part test: (1) a state agency authorized to conserve endangered or threatened species must administer the plan, (2) the plan must include conservation programs consistent with the ESA, (3) it must authorize the state agency to investigate species to determine if they require protection, (4) it must allow states to adopt other conservation programs, including land acquisition programs, and (5) it must provide for public participation in designating state-listed species.<sup>59</sup> A court may partially accept a plan under the second standard if it meets the last three requirements and provides for "immediate action" for the species in most urgent need.<sup>60</sup>

## II

### STATE AND LOCAL CONSERVATION PLANS: HOW THEY FARE ON THE GROUND AND IN THE COURTS

Several states across the country have adopted local conservation plans in the face of a potential listing under the ESA. Individuals and conservation organizations have challenged agency acquiescence to those plans in Oregon, Texas, and California. This Part will describe the details of the plans as well as the challenges they have faced in court.

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<sup>58</sup> Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), 65 Fed. Reg. 42,422, 42,473 (July 10, 2000) (to be codified at 50 C.F.R. pt. 223).

<sup>59</sup> See Ortiz, *supra* note 8, at 493.

<sup>60</sup> See *id.* at 493-94.

A. Oregon<sup>61</sup>1. *The Oregon Coastal Salmon Restoration Initiative*

In *Oregon Natural Resources Council v. Daley*,<sup>62</sup> several conservation groups brought suit against the NMFS to force the listing of several species of salmon.<sup>63</sup> The rivers of Oregon are home to several distinct species of salmon.<sup>64</sup> Young salmon, fry, are born in and remain in the rivers; however, as smolts, they migrate down the river and spend most of their adult lives in the ocean before returning to the river habitat to spawn, normally their natal stream.<sup>65</sup> This biological pattern leads to two distinct problems in connection with the ESA: first, because salmon tend to return to their natal stream, the fish have developed distinct genetic strains,<sup>66</sup> each of which the ESA may protect as a separate species; second, salmon are uniquely vulnerable to changes in their stream habitat because their breeding cycle relies upon a healthy, cold, free-running stream.<sup>67</sup> Therefore, not only do salmon

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<sup>61</sup> The discussion in Part II.A. is limited to only one aspect of the controversies and complications surrounding Pacific Northwest salmon and the ESA. As one commentator has noted:

The systemic issues presented by listed salmon in the Snake/Columbia River basin [in the Pacific Northwest] are massive, involving several states and a neighboring nation, as well as Indian tribal rights, ocean fisheries, hydropower production, fish hatcheries, land uses above the river, and a variety of federal and regional agencies and laws, of which the ESA is only one.

Sax, *supra* note 7, at 2386.

<sup>62</sup> 6 F. Supp. 2d 1139 (D. Or. 1998).

<sup>63</sup> *Id.* at 1142. "[T]here are twenty-three salmon runs, referred to by the [NMFS] as 'evolutionarily significant units,' now listed under the ESA, covering an area from southern California to the Canadian border." Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 WASH. L. REV. 519, 522 (1999) (footnote omitted).

<sup>64</sup> See Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 742-43 (2000).

<sup>65</sup> See *id.*

<sup>66</sup> The ESA's protections apply to species, distinct subgroups of animal populations. "NMFS applies this definition to Pacific salmonids by evaluating whether a stock represents an 'evolutionarily significant unit' (ESU). To qualify as an ESU, a stock must be 'substantially reproductively isolated' and must be 'an important component in the evolutionary legacy of the species.'" *Id.* at 743 (citations omitted) (quoting Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,612 (Nov. 20, 1991)).

<sup>67</sup> See *Or. Natural Res. Council*, 6 F. Supp. 2d at 1146 (stating that factors contributing to the salmon's decline in Oregon include forestry practices, logging and road building, urbanization, disturbance of riparian habitat (such as increased sedimentation of the rivers and streams), and agricultural practices and their consequences such as overgrazing, water diversion, runoff, and soil compaction); see also *Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon*, 62 Fed. Reg. 24,588, 24,593 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227) (finding that the important elements of water quality for salmon survival include water temperature, water oxygenation, and lack of sediment and pollutants).

develop into unique species, but any one species becomes entirely dependent upon the continued integrity of a single stream. As a result of these and other problems "[d]uring [the twentieth] century, indigenous, naturally reproducing populations of coho salmon 'have been extirpated in nearly all Columbia River tributaries and they are in decline in numerous coastal streams throughout Washington, Oregon, and California.'"<sup>68</sup>

In 1993, several conservation organizations petitioned the NMFS to list coho salmon populations indigenous to the West Coast as either threatened or endangered.<sup>69</sup> Among the species identified as an Evolutionary Significant Unit (ESU)<sup>70</sup> was the Oregon Coast ESU,<sup>71</sup> whose "spawning escapements dropped from an estimated 1.0–1.4 million fish in the early 1900s to between 16,500–37,688 fish in 1991–92."<sup>72</sup> In response to the petition, the NMFS formed a scientific review group to study the status of the salmon.<sup>73</sup> Although the group did not consider the effectiveness of existing conservation measures, in 1994 it concluded that the decline in historic numbers of salmon showed that a listing was warranted.<sup>74</sup>

In mid-1995, the NMFS issued a proposed rule to list the Oregon Coast ESU as threatened.<sup>75</sup> A few months later, the same scientific review group that had reviewed the status of the coho issued another report.<sup>76</sup> The second report concluded "that 'coho salmon in [the Oregon Coast] ESU are not at immediate risk of extinction but are likely to become endangered in the future if present trends continue.'"<sup>77</sup> The group based its conclusion upon low salmon abun-

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<sup>68</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1145 (quoting Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionary Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. at 24,588).

<sup>69</sup> *Id.*, 6 F. Supp. 2d at 1143.

<sup>70</sup> *See supra* note 66.

<sup>71</sup> The particular coho strain at issue in this case was the Oregon Coast ESU, the *Oncorhynchus kisutch*, whose range extends from Cape Blanco to the Columbia River (not including the Klamath and the Rogue River basins). *See Or. Natural Res. Council*, 6 F. Supp. 2d at 1142, 1143.

<sup>72</sup> *Id.* at 1145 (footnote omitted). "'Escapements' are adult salmon leaving the ocean to return to their natal streams to spawn." *Id.* at 1145 n.7.

<sup>73</sup> *Id.* at 1146.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1143. Normally, the agency is required to issue the final rule within one year of the publication of the proposed rule, but the district court extended the deadline "in light of a three-month moratorium on listing actions imposed by Congress." *Id.* at 1144. Congress enacted this moratorium on April 10, 1995, prohibiting listing activities and eliminating funding for such activities. Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608, 46,610 (Sept. 4, 1996). A Presidential waiver lifted the moratorium on April 26, 1996. *Id.* at 46,611.

<sup>76</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1146.

<sup>77</sup> *Id.* (alteration in original) (quoting coho salmon status report).

dance estimates, downward long-term trends, below-replacement spawner-to-spawner ratios, habitat degradation, extensive hatchery production, drought, and poor ocean conditions.<sup>78</sup> After invoking a six-month extension,<sup>79</sup> the NMFS finally decided not to list the Oregon Coast ESU, based in part upon Oregon's recently adopted Oregon Coastal Salmon Restoration Initiative (OCSRI).<sup>80</sup>

This delay was "critical . . . because it allowed Oregon more time to . . . avoid[ ] [an] ESA listing."<sup>81</sup> In October 1995, Governor Kitzhaber launched Oregon's work on the OCSRI in response to the NMFS's proposed rule to list the Oregon Coast ESU.<sup>82</sup> The OCSRI's goals were to avoid a listing, to restore coho populations, and to use only existing regulatory measures and voluntary action.<sup>83</sup> The team charged with developing the OCSRI presented a draft plan to the NMFS in August 1996.<sup>84</sup> The OCSRI was the subject of both public comment and federal and nonfederal scientific review before its final adoption in March 1997.<sup>85</sup> In its final form, the OCSRI contained four key tenets:

- 1) an ecosystem approach that requires a systematic consideration of the full range of attributes of aquatic health, 2) a focus on reversing factors for decline and meeting objectives that address those factors, 3) use of adaptive management and a comprehensive monitoring strategy, and 4) involving citizens and constituent groups into the restoration process.<sup>86</sup>

The OCSRI's protective measures focused on three areas. In the first, habitat measures, the OCSRI included both implemented and unimplemented measures, voluntary actions,<sup>87</sup> and "adaptive management"

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<sup>78</sup> *Id.* at 1146-47.

<sup>79</sup> *Id.* at 1144.

<sup>80</sup> See Ortiz, *supra* note 8, at 482-83. For a comprehensive review of the OCSRI's provisions, see Golightly, *supra* note 26, at 406-17. Note that preexisting federal conservation efforts such as the Northwest Forest Plan were among the mix of listing factors for salmon in the Northwest. See *Or. Natural Res. Council*, 6 F. Supp. 2d at 1147, 1155-57. However, in the case of the Oregon Coast ESU, the NMFS concluded that the Northwest Forest Plan was relatively ineffective because it governs management of federal lands, which comprise only thirty-five percent of the Oregon Coast ESU habitat area. *Id.* at 1147, 1157.

<sup>81</sup> Golightly, *supra* note 26, at 405.

<sup>82</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1147.

<sup>83</sup> See Blumm & Corbin, *supra* note 63, at 545-46.

<sup>84</sup> Golightly, *supra* note 26, at 399.

<sup>85</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1147.

<sup>86</sup> *Id.* (quoting the final version of the OCSRI).

<sup>87</sup> For example, Oregon's local watershed councils, which are "groups established to improve the condition of the state's watersheds," are voluntary. Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,604 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227). However, "[t]he OCSRI [itself] admits . . . that

with an independent scientific peer review component.<sup>88</sup> In the second, hatchery measures, the OCSRI depended upon a previous policy, the Wild Fish Management Policy, that Oregon had designed to reduce the number of hatchery fish escaping into wild fish populations.<sup>89</sup> However, the NMFS had previously found that Oregon had not fully implemented this policy.<sup>90</sup> In the third, harvest measures, the OCSRI continued previous management practices that had reduced harvest mortality from its peak in the 1970s to current levels.<sup>91</sup> Thus, substantial portions of the OCSRI relied upon previously existing measures (with some adjustments) and upon additional voluntary measures.

Less than one month after Oregon adopted the final OCSRI, the NMFS scientific review group again considered the status of the salmon.<sup>92</sup> The group considered two different scenarios: that Oregon would fully implement the OCSRI, or that current conditions would continue.<sup>93</sup> If Oregon were to fully implement the OCSRI, the group was “evenly split” about whether the measures would have an impact significant enough to move the Oregon Coast ESU out of the “‘likely to become endangered’ category.”<sup>94</sup> On the other hand, if current conditions were to continue, the group concluded that the Oregon Coast ESU, while “‘not at significant short-term risk of extinction,’ [was] ‘likely to become endangered in the foreseeable future.’”<sup>95</sup>

In April 1997, “[i]n an effort to improve the OCSRI and to support a decision not to list,”<sup>96</sup> Oregon and the NMFS entered into a Memorandum of Agreement (MOA).<sup>97</sup> Either side could terminate the MOA with only thirty days notice.<sup>98</sup> The MOA stated that the NMFS had evaluated the OCSRI and concluded that its measures needed early adjustments relating to habitat protection and restoration.<sup>99</sup> It further provided for cooperation between Oregon and the NMFS regarding forestry practices, including a commitment from Or-

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watershed councils still lack adequate funding, technical support, and the trusted relationships with local landowners needed to be truly effective.” Golightly, *supra* note 26, at 413.

<sup>88</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1147.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1148.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (quoting updated status review).

<sup>95</sup> *Id.* (quoting updated status review).

<sup>96</sup> Golightly, *supra* note 26, at 417.

<sup>97</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1148.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* The “NMFS promised [in the MOA] to guide the state towards those actions that would make a listing unnecessary.” Golightly, *supra* note 26, at 399.



egon that it would promptly consider proposals from the NMFS regarding changes to Oregon's forestry practices.<sup>100</sup>

On April 25, 1997,<sup>101</sup> after Oregon adopted the OCSRI, the NMFS withdrew its proposed rule to list the Oregon Coast ESU and determined that "the Oregon Coast coho is not likely to become endangered in the interval between this decision and the adoption of improved habitat measures by the State of Oregon."<sup>102</sup> While admitting that the OCSRI does "not currently provide the protections NMFS considers essential to creating and maintaining the high quality habitat needed to sustain Oregon Coast coho over the long term,"<sup>103</sup> the NMFS accepted the combination of the OCSRI and the MOA in the place of a listing.<sup>104</sup> The NMFS further stated that if Oregon did not implement the OCSRI measures and the agreements contained in the MOA within two years, the NMFS would change the status of the Oregon Coast ESU "to whatever extent may be warranted."<sup>105</sup> Moreover, the NMFS would review its decision as a matter of course at the three-year mark<sup>106</sup> because of its heavy reliance on the OCSRI.<sup>107</sup> In the interim between the withdrawal and the implementation of the OCSRI, the NMFS designated the Oregon Coast ESU as a candidate species.<sup>108</sup> Foreshadowing later controversy, the NMFS made the decision not to list the Oregon Coast ESU amid substantial internal criticism over both the legality of the decision and the likelihood that the OCSRI would be successful in protecting the Oregon Coast ESU.<sup>109</sup>

## 2. *The Salmon Case: Oregon Natural Resources Council v. Daley*

Several conservation groups brought suit challenging the agency's determination not to list the Oregon Coast ESU.<sup>110</sup> The

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<sup>100</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1148.

<sup>101</sup> *Id.* at 1149.

<sup>102</sup> See Ortiz, *supra* note 8, at 483 (quoting Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,607 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227)).

<sup>103</sup> Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. at 24,607.

<sup>104</sup> *Id.* at 24,607-08.

<sup>105</sup> *Id.* at 24,608.

<sup>106</sup> Three years is the life cycle of coho salmon. *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 24,607; see *infra* note 152 and accompanying text.

<sup>109</sup> See *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1148-49 (D. Or. 1998). The internal criticism also contended that, in the face of uncertainty, the NMFS's obligations were to err on the side of caution and list the species. *Id.* at 1149.

<sup>110</sup> Actually, the Oregon suit is part of a long history of litigation between these parties that originally began in California and involved many of the West Coast salmon species,

plaintiffs advanced several different arguments, including violations of both the ESA and the Administrative Procedure Act (APA):<sup>111</sup> that the Oregon Coast ESU was threatened or endangered as a “biological fact” and the NMFS had a nondiscretionary duty to list the species; that the NMFS used an improper legal standard; that the NMFS did not base its decision on the best scientific information as the ESA mandates; that the NMFS improperly relied upon both the OCSRI and the Northwest Forest Plan; that the NMFS relied upon improper factors; and that the decision was based upon political concerns.<sup>112</sup> Both parties moved for summary judgment.<sup>113</sup> In setting the stage for its decision, the Oregon District Court first discussed the definition of arbitrary and capricious action. Arbitrary and capricious agency decisionmaking, stated the court,

has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>114</sup>

The court also noted that, although reviews of agency determinations are normally limited to the administrative record, the court could “consider material outside the administrative record ‘(1) if necessary to determine whether the agency considered all relevant factors and has explained its decision, (2) when the agency relied on documents not in the record, or (3) when . . . necessary to explain technical terms or complex subject matter.’”<sup>115</sup>

The district court determined that the NMFS relied upon the wrong standard in determining whether to list the species. The agency incorrectly looked at the likelihood that the species would become endangered prior to the adoption of improved habitat measures.<sup>116</sup> Instead, the NMFS should have determined whether the species is likely to become endangered “‘within the foreseeable fu-

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but which the court transferred to Oregon after the only remaining dispute involved an Oregon ESU. *See id.* at 1142–45.

<sup>111</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (1994 & Supp. IV 1998)).

<sup>112</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1150.

<sup>113</sup> *Id.* at 1142.

<sup>114</sup> *Id.* at 1145 (quoting *O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

<sup>115</sup> *Id.* (quoting *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).

<sup>116</sup> *Id.* at 1150–51.

ture.”<sup>117</sup> The ESA requires that the NMFS list a species as threatened if it is likely to become endangered within the foreseeable future.<sup>118</sup> The court concluded that by shortening the time span relevant to the period between the decision not to list and the adoption of the OCSRI’s measures, which arguably would occur just two years later in 1999, the NMFS had relied upon an incorrect legal standard.<sup>119</sup> The court characterized this as a “fatal flaw,”<sup>120</sup> noting that “the final rule expressly warns that ‘the habitat measures contained in the OCSRI will not secure adequate high quality habitat over the long term.’”<sup>121</sup>

Adopting something akin to the plaintiffs’ contention that the species was threatened as a biological fact, the court stated that “[i]t is incongruous for the NMFS to defer listing a species as ‘threatened’ because the agency is hoping for a significant alteration in the conditions or practices presently threatening the long-term viability of the species, which in turn might prevent the species from actually reaching the ‘endangered’ level.”<sup>122</sup> Instead, the court argued, “[b]y definition, a ‘threatened’ species is one that is likely to become endangered in the foreseeable future *barring significant changes in the conditions or practices that are threatening the long-term viability of that species.*”<sup>123</sup> Therefore, the Oregon Coast ESU is a threatened species because it is likely to become endangered in the foreseeable future unless Oregon implements the OCSRI and the agreements in the MOA; even then, these measures do not guarantee preservation of the coho salmon.<sup>124</sup> According to the court, the final rule only delayed a decision to list using a mechanism not included or allowed within the ESA, which otherwise contains very strict guidelines for the timing of listing decisions.<sup>125</sup>

Even if the NMFS had relied upon the proper standard, the district court concluded that reliance upon an unimplemented,<sup>126</sup> partly

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<sup>117</sup> Ortiz, *supra* note 8, at 485 (quoting *Or. Natural Res. Council*, 6 F. Supp. 2d at 1150–51).

<sup>118</sup> See 16 U.S.C. §§ 1532(20), 1533(c) (1994); *supra* note 35 and accompanying text.

<sup>119</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1151. Although the ESA does not define “foreseeable future,” the court concluded that it was unnecessary to define the term because it was certainly longer than the interval at issue and the NMFS conceded that a reasonable time frame in the context of the Oregon Coast ESU determination was thirty years, or ten life spans of the coho salmon. *Id.*

<sup>120</sup> *Id.* at 1150.

<sup>121</sup> *Id.* at 1151 (quoting Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,605 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227)).

<sup>122</sup> *Id.* at 1152.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* at 1153.

voluntary,<sup>127</sup> and unproven plan was arbitrary and capricious and therefore not an acceptable agency action.<sup>128</sup> The court determined that none of the factors upon which the final rule relied<sup>129</sup> supported the NMFS's decision not to list the Oregon Coast ESU.<sup>130</sup>

The plaintiffs asserted that the NMFS may not consider voluntary or unimplemented OCSRI measures.<sup>131</sup> They contended that two ESA clauses mandated this result: the "inadequacy of existing regulatory mechanisms"<sup>132</sup> clause and the clause requiring that the NMFS use only the best available data "after taking into account those efforts, if any, being made by any State . . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices."<sup>133</sup> The first clause, standing alone, "would preclude consideration of any future or voluntary conservation efforts which, by definition, are not 'existing' or 'regulatory'" because the clause is unambiguous.<sup>134</sup> The second clause, standing alone, could allow such consideration of future, voluntary efforts because "the language . . . concerning 'efforts' and 'other conservation practices' is much broader."<sup>135</sup> However, the court determined that agencies could not consider future actions because the two provisions of the ESA that refer to consideration of state actions either allude to "existing" regulatory mechanisms or speak only in the present tense about state efforts to protect the species.<sup>136</sup> The court also surveyed previous judicial opinions that would similarly reject the idea that the NMFS could rely upon Oregon's future actions.<sup>137</sup> Therefore, the court concluded that the NMFS may not rely upon future, promised

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<sup>127</sup> See *id.*

<sup>128</sup> See *id.* at 1152–53. As the court stated: "However laudable Oregon's efforts to employ new management techniques . . . , such future, voluntary conservation efforts cannot be a legal substitute for listing. . . . [I]t was arbitrary and capricious for the NMFS to rely on future, voluntary and untested habitat measures . . . ." *Id.* at 1159.

<sup>129</sup> The court listed these factors as harvest improvements, hatchery improvements, the Northwest Forest Plan habitat protection, the improving escapement trend, the OCSRI, and the MOA. *Id.* at 1152–53.

<sup>130</sup> *Id.* at 1153.

<sup>131</sup> *Id.*

<sup>132</sup> 16 U.S.C. § 1533(a)(1)(D) (1994); *Or. Natural Res. Council*, 6 F. Supp. 2d at 1153.

<sup>133</sup> 16 U.S.C. § 1533(b)(1)(A); *Or. Natural Res. Council*, 6 F. Supp. 2d at 1153.

<sup>134</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1153.

<sup>135</sup> *Id.*; see *id.* at 1154–55.

<sup>136</sup> See *id.* at 1153; Ortiz, *supra* note 8, at 485–86.

<sup>137</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1153–54. These cases, discussed *infra* Parts II.B.2, III.B.1, and III.D, are *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997), *aff'd on other grounds*, 115 F.3d 346 (5th Cir. 1997); *Friends of the Wild Swan, Inc. v. United States Fish and Wildlife Service*, 945 F. Supp. 1388 (D. Or. 1996); *Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23 (D.D.C. 1996); and *Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 49 (D.D.C. 1996).

state action even if the plan has been formally adopted at the time of the listing decision.<sup>138</sup>

In a less textual argument, the court concluded that voluntary actions are not enforceable, and therefore the NMFS cannot depend upon them to protect the species.<sup>139</sup> Stating that "[t]he parties [had] failed to shed any light on Congressional intent"<sup>140</sup> regarding the differing use of language in the two clauses at issue, the court proceeded to apply the same reasoning it used to determine that the NMFS may not consider future actions.<sup>141</sup> As the court stated, "for the same reason that the Secretary may not rely on future actions, he should not be able to rely on unenforceable efforts. Absent some method of enforcing compliance, protection of a species can never be assured. Voluntary actions, like those planned in the future, are necessarily speculative."<sup>142</sup>

Additionally, the court highlighted the NMFS's inconsistent actions regarding dependence upon voluntary actions in the context of other West Coast salmon ESUs. Specifically, the court noted that the NMFS had found a California salmon protection measure deficient because "'landowner participation in the program is voluntary.'"<sup>143</sup> Moreover, the NMFS had refused to consider the OCSRI when it decided to list the Umpqua River cutthroat trout, another species included within the provisions of the OCSRI.<sup>144</sup>

According to the court, the NMFS could not give any weight to voluntary actions in determining not to list the species.<sup>145</sup> Therefore, the NMFS improperly relied upon the OCSRI.<sup>146</sup> Finally, Oregon's voluntary and future actions were critical to the final rule.<sup>147</sup> The court granted the plaintiffs' motion for summary judgment.<sup>148</sup> The court later denied Oregon's motion for a stay of its decision.<sup>149</sup> In that decision, the court characterized its finding that the NMFS "used

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<sup>138</sup> See Ortiz, *supra* note 8, at 485-86.

<sup>139</sup> See *id.* at 486.

<sup>140</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1154.

<sup>141</sup> *Id.* at 1155.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1159 (quoting Endangered and Threatened Species; Threatened Status for Southern Oregon/North Carolina Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,606 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227)).

<sup>144</sup> *Id.* at 1158-59.

<sup>145</sup> See Ortiz, *supra* note 8, at 486. But see Gregoire & Costello, *supra* note 19, at 716 (arguing that the ESA's text authorizes consideration of any state "efforts," not just enforceable requirements).

<sup>146</sup> *Or. Natural Res. Council*, 6 F. Supp. 2d at 1155.

<sup>147</sup> See *id.* at 1158, 1159.

<sup>148</sup> *Id.* at 1142.

<sup>149</sup> *Or. Natural Res. Council v. Daley*, 16 F. Supp. 2d 1256, 1258 (D. Or. 1998).

an improper time frame for evaluating the risk of species endangerment" as its "primary finding."<sup>150</sup>

B. Texas

1. *The Barton Springs Salamander, Development of the Local Plan, and Agency Action*

In Texas, a similar problem evolved through a different chain of events. The NMFS and the FWS initiated Candidate Conservation Agreements as part of a policy to improve the public's view of the ESA.<sup>151</sup> However, the agencies have sometimes used the policy in a different and problematic way, responding to the adoption of a Candidate Conservation Agreement by stopping a listing proceeding.<sup>152</sup>

The District Court for the Western District of Texas concluded in *Save Our Springs v. Babbitt*<sup>153</sup> that the FWS cannot rely upon future actions of a state or unproven plans of a state in refusing to list a species under the ESA.<sup>154</sup> In this case, a local conservation organization petitioned for the listing of the Barton Springs salamander that lived in only one Texas spring.<sup>155</sup>

The Edwards Aquifer supplies water to a substantial part of central Texas.<sup>156</sup> The Texas Legislature enacted the Edwards Aquifer Act

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<sup>150</sup> *Id.* at 1258. The court refuted Oregon's assertion that its previous decision granting summary judgment would result in irreparable injury because of decreased voluntary conservation efforts by Oregonians. The court noted that Oregonians have other reasons to continue their actions, specifically, to save the Oregon Coast ESU. *Id.* The court also stated that the immediate cessation of funding was a "self-inflicted wound." *Id.* In fact, in 1999, Oregon dropped its pending appeal and Governor Kitzhaber issued an "Executive Order . . . that . . . contended that the OCSRI . . . would in fact play a prominent role in the recovery process." Golightly, *supra* note 26, at 444-45.

<sup>151</sup> See *supra* text accompanying note 54.

<sup>152</sup> See Ortiz, *supra* note 8, at 480-81. Note that the Oregon Coast ESU was not a candidate species at the time of the withdrawal in the case discussed *supra* Part II.A. Thus, it did not present this particular problem because the OCSRI and the MOA did not technically constitute a Candidate Conservation Agreement.

<sup>153</sup> 27 F. Supp. 2d 739 (W.D. Tex. 1997), *aff'd on other grounds*, 115 F.3d 346 (5th Cir. 1997).

<sup>154</sup> See *id.* at 747-48.

<sup>155</sup> See *id.* at 741 (citing Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608, 46,609 (Sept. 4, 1996) (to be codified at 50 C.F.R. pt. 17). The Barton Spring salamander, *Eurycea sosorum*, "is a small, aquatic salamander . . . species. It lives at Barton Springs Austin's Zilker Park and is found naturally nowhere else in the world." *Id.*

<sup>156</sup> See *Sierra Club v. City of San Antonio*, 112 F.3d 789, 791-93 (5th Cir. 1997) (discussing another ESA controversy surrounding the Edwards Aquifer, a suit over the endangered fountain darter, and applying the *Burford* abstention doctrine, see *Burford v. Sun Oil Co.*, 319 U.S. 312 (1943), to vacate the injunction of the district court). This case discusses the applicability of the abstention doctrine to the type of reverse preemption discussed in this Note (that is, when a state adopts a plan to preempt a federal listing process). The court stated:

The Sierra Club argues that abstention cannot be used to create "negative preemption," meaning that a state cannot set up its own regulatory

in 1993 to control and manage the use of the aquifer.<sup>157</sup> The Edwards Aquifer Act was subject to substantial controversy over the ensuing years, including a declaration of unconstitutionality, which was later overturned.<sup>158</sup> The Edwards Aquifer supplies water to Barton Springs through the Barton Springs segment of the aquifer.<sup>159</sup> The Edwards Aquifer is a "karst" aquifer,<sup>160</sup> which can transmit large volumes of water very rapidly without substantial filtration.<sup>161</sup> Therefore, it is highly susceptible to water pollution.<sup>162</sup>

The Barton Spring salamander is very susceptible to environmental dangers. It is "entirely aquatic and neotenic."<sup>163</sup> As a result, the salamander is extraordinarily dependent upon the springs within its small range for a continual supply of clean, flowing water.<sup>164</sup> Because the Edwards Aquifer, a karst aquifer, feeds water to Barton Springs, Barton Springs faces substantial danger from pollution.<sup>165</sup> Over the past century, the number of Barton Springs salamanders observed has decreased dramatically, from hundreds of individuals and abundant populations in the middle of the century to around twenty individuals in the 1990s.<sup>166</sup> In 1982, the Department of Interior designated the salamander as a "category two" candidate for listing.<sup>167</sup> Ten years

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scheme and then claim that a federal regulatory scheme should be ignored. . . .

. . . [W]e agree with the Sierra Club that, as a general proposition, a State should not be able to create a regulatory scheme and then claim that federal regulation of the same subject matter does not apply. In effect it argues the state Act has "preempted" federal review of its federal claim if the federal court abstains. The response to this argument, however, is that the same thing happens *whenever* a federal court abstains and the plaintiff has asserted a federal claim.

*Id.* at 797.

<sup>157</sup> *Id.* at 792.

<sup>158</sup> See *id.* (discussing the history of controversy surrounding the Edwards Aquifer Act).

<sup>159</sup> Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,608.

<sup>160</sup> *Id.* at 46,610. Karst aquifers, because of the presence of dissolved calcium carbonate, contain naturally forming pipe-like structures that increase the permeability of the aquifer. See *id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* In fact, the Texas Water Commission itself found the Edwards Aquifer to be "one of the most sensitive aquifers in Texas to groundwater pollution." *Id.*

<sup>163</sup> *Id.* at 46,608. "Neotenic" means that the salamander "does not metamorphose into a terrestrial form and retains its bright red external gills throughout life." *Id.*

<sup>164</sup> *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 741 (W.D. Tex. 1997).

<sup>165</sup> See Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,610.

<sup>166</sup> See *id.* at 46,608-09.

<sup>167</sup> *Save Our Springs*, 27 F. Supp. 2d at 741. A category two candidate species listing "indicates that while data exists [sic] which suggests [sic] the species may be threatened or endangered, further biological information is needed before [the species] can be listed as threatened or endangered under the ESA." *Defenders of Wildlife v. Babbitt*, No. 97-CV-2330 TW, 1999 U.S. Dist. LEXIS 10366, at \*2 (S.D. Cal. June 14, 1999), *rev'd sub nom*, *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

later, two academics at the University of Texas petitioned the FWS to list the salamander.<sup>168</sup>

In 1994, after missing several deadlines, the FWS issued a proposed rule that would have listed the salamander as endangered under the ESA.<sup>169</sup> The proposed rule relied upon several perceived threats to the salamander. First, and most importantly, the FWS concluded that the salamander was in danger from “‘contamination of the waters that feed Barton Springs due to the potential for catastrophic events (such as petroleum or chemical spills) and chronic degradation resulting from urban activities.’”<sup>170</sup> Second, disturbances of the salamander’s surface habitat contributed to the FWS’s proposed rule.<sup>171</sup> Finally, increased groundwater withdrawals, leading to reduced groundwater available for the salamander, potentially threatened the salamander.<sup>172</sup>

At this stage of the listing process, the FWS specifically considered the adequacy of Texas’s regulatory protections for the salamander. The FWS concluded that these protections were inadequate for several reasons, including:

- a. The failure of [the Texas Parks and Wildlife Department] to list the salamander on the State’s endangered species list, thus denying it the protection of that agency;
- b. Ineffectiveness of State water quality rules and regulations to provide assurances of long-term water quality protection;
- c. The absence of regulations prohibiting hazardous material transportation across the aquifer;
- d. The absence of retrofit provisions for water quality control structures on existing roadways;
- e. The failure of municipal water quality regulations to apply outside of the City of Austin’s extraterritorial jurisdiction;
- f. The failure of the State’s “Edwards Rules” to apply to contributing zone, to address existing development, to prescribe site-specific water quality performance standards, to address the effects of cumulative impacts on water quality in the Aquifer, or to address land use or impervious cover. Further, none of the ordinances include retrofit provisions for existing developments or land use regulations and those ordinance[s] in effect can be rendered ineffective by variance provisions and exemptions;

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<sup>168</sup> *Save Our Springs*, 27 F. Supp. 2d at 741.

<sup>169</sup> *Id.* at 741–42.

<sup>170</sup> *Id.* at 742 (quoting Endangered and Threatened Wildlife and Plants; Proposal to List the Barton Springs Salamander as Endangered, 59 Fed. Reg. 7968, 7968 (Feb. 17, 1994) (to be codified at 50 C.F.R. pt. 17)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*



- g. The absence of any legally enforceable commitment or incentive for the City of Austin to change its pool cleaning and maintenance to protect the salamander; and
- h. The absence of regulatory authority over thirty to forty percent of groundwater pumping as well as only limited enforcement authority to control the pumping over which the regulatory authority does exist.<sup>173</sup>

These deficiencies are clearly relevant to one of the factors the ESA mandates that agencies consider in a listing decision: "the inadequacy of existing regulatory mechanisms."<sup>174</sup> In responding to public comments suggesting that the existing regulatory mechanisms were adequate, the FWS stated that the existing mechanisms were not adequate for two broad reasons: first, there was no information to show that the existing rules "will be adequate to protect the salamander and its habitat"; second, "there [were] no assurances that the existing rules and regulations will remain in place and be enforced."<sup>175</sup> For example, the state agency in charge of regulating the quantity of water taken from the Barton Springs segment of the Edwards Aquifer only has authority to regulate sixty to seventy percent of the total volume pumped.<sup>176</sup> The FWS also expressed concern about the voluntary nature of some provisions upon which commentators based their remarks.<sup>177</sup>

Instead of making a final determination whether to list the salamander within the year allowed, the salamander decision became embroiled in controversy and delay.<sup>178</sup> When the case finally returned to the district court, the court ordered the FWS to make a final listing decision.<sup>179</sup> In response, the FWS "reopened the comment period to ascertain whether any additional regulatory protection was offered by the State. . . . On the date the comment period closed, there was no

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<sup>173</sup> *Id.* at 743 (citing Endangered and Threatened Wildlife and Plants; Proposal to List the Barton Springs Salamander as Endangered, 59 Fed. Reg. at 7975-76).

<sup>174</sup> 16 U.S.C. § 1533(a)(1)(D) (1994); *see supra* text accompanying note 35.

<sup>175</sup> Endangered and Threatened Wildlife and Plants; Proposal to List the Barton Springs Salamander as Endangered, 59 Fed. Reg. at 7971.

<sup>176</sup> *See id.* Further, the FWS stated: "No existing rules or regulations specifically require protection of the . . . salamander or its habitat. . . . Furthermore, whether the existing rules and regulations can provide long-term protection . . . is unknown." *Id.* at 7975.

<sup>177</sup> "While the City of Austin has voluntarily committed to revising pool cleaning and other maintenance operations in Zilker Park to assist in protecting the salamander and its surface habitat, no legal agreement or other incentive is in place to ensure that these efforts will continue for the long term." *Id.*

<sup>178</sup> The FWS first extended the listing determination deadline by six months. *Save Our Springs*, 27 F. Supp. 2d at 742. Then, after the same academics sued the FWS, the district court found that the FWS violated its duty and ordered it to act. *Id.* However, the FWS claimed that it was unable to make a decision because of a listing moratorium. *Id.* *See supra* note 75 for details of this moratorium. Finally, while the appeal was pending, the President lifted the moratorium. *See Save Our Springs*, 27 F. Supp. 2d at 742.

<sup>179</sup> *Save Our Springs*, 27 F. Supp. 2d at 742.

additional regulatory protection offered by the State of Texas.”<sup>180</sup> In fact, the FWS reopened the comment period “in part due to the potential for new information on proposed regulatory protection under State authorities.”<sup>181</sup> On the same day the FWS reopened the comment period, “representatives from the State of Texas met with officials from the Department of the Interior to discuss the [proposed state] Conservation Agreement.”<sup>182</sup> Roughly six weeks later, the regional office of the FWS approved the rule to list the salamander and forwarded it to Washington, D.C. for final approval.<sup>183</sup>

Five days after the local office’s approval of the final rule listing the salamander as endangered, Texas agencies and the FWS executed the Barton Springs Salamander Conservation Agreement and Strategy (“Conservation Agreement”), which promised future action to protect the salamander.<sup>184</sup> The Conservation Agreement had two goals: first, “to eliminate or significantly reduce the threats to the species,”<sup>185</sup> such as “risk of catastrophic events” and second, to establish a captive breeding program.<sup>186</sup> The Conservation Agreement further required Texas state agencies to take certain actions to meet the Agreement’s objectives.<sup>187</sup> About three weeks after the agencies exe-

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<sup>180</sup> *Id.*

<sup>181</sup> Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608, 46,612 (Sept. 4, 1996) (to be codified at 50 C.F.R. pt. 17).

<sup>182</sup> *Save Our Springs*, 27 F. Supp. 2d at 742.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 742–43; Ortiz, *supra* note 8, at 480–81. “The Agreement include[d] a State commitment to implement specific conservation measures to protect the salamander, its habitat and the ecosystem, the Barton Springs segment of the Edwards Aquifer.” Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,612 (emphasis added).

<sup>185</sup> *Save Our Springs*, 27 F. Supp. 2d at 743 (quoting Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,613). In fact, the possibility of catastrophic pollution events was not farfetched. Following an “improper application of chlorine to clean Barton Springs Pool, only 10 to 11 salamanders were observed and could only be found in an area of about 5 sq. m (54 sq. ft) in the immediate vicinity of the Parthenia Spring outflows.” Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,609.

<sup>186</sup> *Save Our Springs*, 27 F. Supp. 2d at 743. Although captive breeding programs existed in two facilities, neither facility was able to bring hatching success above eight percent. Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,609.

<sup>187</sup> *Save Our Springs*, 27 F. Supp. 2d at 743–44. The particular actions the Conservation Agreement mandated were:

- a. Enforcement and monitoring of compliance with existing regulations and adoption, implementation and enforcement of currently proposed regulations;
- b. Prevention of catastrophic contaminant releases into the spring waters;
- c. Prevention of degradation of the springhead habitat; establishment of a captive breeding program; and development of a better biological understanding of the salamander population.

cuted the Conservation Agreement, the FWS withdrew the proposed rule, finding that "information now available . . . justifies withdrawal of the proposed listing of this species as endangered. Various agencies of the State of Texas have committed to expedite developing and implementing conservation measures needed for the species and the Barton Springs segment of the Edwards Aquifer."<sup>188</sup> The "information" referred to was the newly executed Conservation Agreement.<sup>189</sup> In its withdrawal notice, the FWS stated:

By protecting the water quality and quantity at Barton Springs and in the Barton Springs segment of the Edwards Aquifer, the involved agencies will reduce the threats to the species to the point that it does not warrant listing. The [FWS] will closely monitor the implementation of the Agreement and, if the Agreement is not accomplishing its purpose the [FWS] will consider the use of the full range of its listing authority, including emergency listing, to protect the species.<sup>190</sup>

The implication of this statement is clearly that the salamander warranted listing at the time the FWS withdrew its proposed rule. The FWS determined not to list the species despite the evidence that it was in danger because of political pressure from the Governor and other groups,<sup>191</sup> and in response to the Conservation Agreement adopted just five days after the recommendation for a final rule listing the salamander.<sup>192</sup> Not more than one month after the recommendation to

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*Id.* at 743 (quoting Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,611). Texas also committed to coordinating conservation activities, implementing a conservation schedule, funding the conservation action, and assessing the progress of the conservation efforts. *Id.* at 743-44.

<sup>188</sup> Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,608; see Ortiz, *supra* note 8, at 480-81 (stating that "despite the fact that the FWS regional office had identified the salamander as facing 'imminent, high magnitude threats,' the FWS withdrew its proposed rule on the salamander, finding that listing was no longer warranted.") (footnotes omitted) (quoting *Save Our Springs*, 27 F. Supp. 2d at 742-43).

<sup>189</sup> See *Save Our Springs*, 27 F. Supp. 2d at 742-43 (stating that the FWS "maintained that 'because the commitment by the State of Texas to fully implement the cooperative Agreement significantly reduces the risks to the species, the [FWS] concludes that listing is no longer warranted'" (quoting Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,608).

<sup>190</sup> Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. at 46,615.

<sup>191</sup> See *Save Our Springs*, 27 F. Supp. 2d at 745. The court in *Save Our Springs* specifically found that: then-Governor George W. Bush expressed his "'deep concerns because the proposed action by the federal government may have the potential to impact the use of private property"; the agencies noted that the listing decision was a "hot issue"; and the summary in the proposed final listing rule stated that there was significant opposition from politicians, including the Governor, state and local agencies, and developers. *Id.*

<sup>192</sup> See Ortiz, *supra* note 8, at 480-81; *supra* note 184 and accompanying text.

list the species, "despite the fact that the FWS regional office had identified the salamander as facing 'imminent, high magnitude threats,' the FWS withdrew its proposed rule on the salamander, finding that listing was no longer warranted."<sup>193</sup>

## 2. *The Salamander Case: Save Our Springs v. Babbitt*

A local conservation organization challenged the FWS's determination not to list the salamander.<sup>194</sup> The District Court for the Western District of Texas criticized the agency's approach and concluded that the state program could not serve as a valid basis for an FWS decision not to list until the program had been in operation for at least two years—sufficient time to test it properly, according to the court.<sup>195</sup>

The parties cross-moved for summary judgment.<sup>196</sup> The court examined in detail the FWS's actions regarding the salamander.<sup>197</sup> The court first concluded that "[n]othing significant appears in the record between the [FWS]'s 1994 statement regarding the concerns of Texas'[s] statutory and regulatory scheme for protecting the species and the withdrawal of the proposed listing except the signing of the Conservation Agreement."<sup>198</sup> Therefore, the court inferred that the Conservation Agreement was the reason the FWS determined not to list the salamander and withdraw the proposed rule.<sup>199</sup>

The court further concluded that none of the actions the Conservation Agreement proposed for immediate implementation "significantly reduce[s] the immediate threats to the species."<sup>200</sup> Specifically, even if Texas fully implemented the measures in the Conservation Agreement, the court concluded that these measures would not address the concerns the FWS raised in 1994 regarding Texas's existing regulatory mechanisms for protecting the species.<sup>201</sup> The court stated: "The effect of the measures articulated in the Conservation Agreement on the species is speculative. There are no assurances that the measures will be carried out, when they will be carried out, nor whether they will be effective in eliminating the threats to the species."<sup>202</sup> The court also noted the political nature of the salamander listing process, especially the involvement of the Governor, and specif-

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<sup>193</sup> *Id.* (quoting *Save Our Springs*, 27 F. Supp. 2d at 745) (footnotes omitted).

<sup>194</sup> *See Save Our Springs*, 27 F. Supp. 2d at 741, 745.

<sup>195</sup> *See id.* at 747–48.

<sup>196</sup> *Id.* at 741.

<sup>197</sup> *See id.* at 741–43.

<sup>198</sup> *Id.* at 743.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 744.

<sup>201</sup> *Id.*; *see also* text accompanying *supra* note 174 (noting the specific shortcomings of Texas's regulatory protections).

<sup>202</sup> *Save Our Springs*, 27 F. Supp. 2d at 744.

ically found "that strong political pressure was applied to the [FWS] to withdraw the proposed listing of the salamander."<sup>203</sup>

The court found that the FWS's decision not to list was an arbitrary and capricious action and struck down the agency decision, ordering the FWS to complete the listing process.<sup>204</sup> The court concluded that the agency may not consider the political aspects of a listing decision.<sup>205</sup>

The court further stated that the ESA itself includes provisions for determining whether a Cooperative Agreement is adequate.<sup>206</sup> The agencies must affirmatively find—and must annually reconfirm—that the Conservation Agreement satisfies these requirements.<sup>207</sup> These provisions, combined with another ESA provision that provides for delisting if future developments mitigate the threats to the species,<sup>208</sup> mean that the FWS cannot rely upon promises of future action contained in the Conservation Agreement to refuse to list a species that would otherwise qualify on the existing record.<sup>209</sup>

The court also found that the FWS erroneously relied upon the Conservation Agreement because the parties did not enter into it until after the comment period closed and, therefore, the Agreement received no public comment.<sup>210</sup> The court concluded its opinion, holding:

When the [FWS] permitted an Agreement, with no proven track record for effectiveness in protecting the species, to play the pivotal role in [its] listing decision and when [it] considered political factors in making [its] listing decision, [it] acted arbitrarily and capriciously. Any listing decision that considers the Conservation Agreement will be deemed by this Court to be arbitrary and capricious until sufficient time has elapsed to permit the [FWS] to determine its effectiveness in protecting the species. This Court considers a sufficient track record to be two years. If the [FWS] then determines the Agreement will be effective in eliminating the

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<sup>203</sup> *Id.* at 745.

<sup>204</sup> *See id.* at 748–49; Ortiz, *supra* note 8, at 481.

<sup>205</sup> *Save Our Springs*, 27 F. Supp. 2d at 747.

<sup>206</sup> *Id.* Specifically, these provisions require the agency to find that the state agency has the authority to conserve the species; the state agency "has established acceptable conservation programs, *consistent with the purposes and policies of this chapter*," and has furnished a copy of these programs to the federal agencies; the state agency has the authority to investigate the status of the species; the state agency has the authority to acquire land for the conservation of the species; and the state agency has included provisions for public participation in the designation of the species. 16 U.S.C. § 1535(c)(1)(A)–(E) (1994) (emphasis added).

<sup>207</sup> 16 U.S.C. § 1535(c)(1).

<sup>208</sup> *See* 16 U.S.C. § 1533(c)(2).

<sup>209</sup> *See Save Our Springs*, 27 F. Supp. 2d at 747.

<sup>210</sup> *Id.* at 748.

threats to the species, [it] can delist the species—if in fact it has been listed.<sup>211</sup>

The court remanded the case back to the agency to make a final listing determination, stating: “It may well [be] that the Conservation Agreement passes with flying colors in its intended effect of eliminating the risk to the species . . . . However, absent some historical data to back the decision that the Conservation Agreement is sufficient . . . , it is arbitrary and capricious to conclude that at this time.”<sup>212</sup> Therefore, a conservation agreement could be a reason not to list a species, but only if the agreement has proven its effectiveness and actually addresses the threats facing the species.<sup>213</sup>

### C. California

#### 1. *The Flat-Tailed Horned Lizard and the Conservation Agreement*

The District Court for the Southern District of California came to a different conclusion in *Defenders of Wildlife v. Babbitt*,<sup>214</sup> apparently conflicting with the decisions in Texas and Oregon. The FWS designated the flat-tailed horned lizard<sup>215</sup> as a category two candidate species under the ESA in 1982.<sup>216</sup> Seven years later, the FWS changed that designation to category one.<sup>217</sup> The region of the United States in which this lizard lives has experienced substantial changes due to human activity. Between one-third to one-half of the lizard’s original habitat “has been lost to agriculture, urbanization, military activities,

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 748–49.

<sup>213</sup> See Ortiz, *supra* note 8, at 481.

<sup>214</sup> No. 97-CF-2330 TW, 1999 U.S. Dist. LEXIS 10366 (S.D. Cal. June 14, 1999), *rev’d sub nom.*, *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001). The Ninth Circuit primarily based its decision upon the District Court’s faulty interpretation of the statutory language “extinction throughout . . . a significant portion of its range.” *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1140, 1140–46 (9th Cir. 2001) (stating that this problem alone would be sufficient to remand the case to the agency). However, in a concluding paragraph, the court went on to fault the Secretary for failing to “address the lizard’s viability in a site-specific manner with regard to the putative benefits of the [Conservation Agreement].” *Id.* The court concluded that “it is unclear how the benefits assertedly flowing from the [Conservation Agreement] affected any particular portion of the lizard’s habitats, . . . unclear how the [Conservation Agreement] could have mitigated threats to the lizard throughout ‘a significant portion of its range,’ and unclear what impact the delay in implementing the Conservation Agreement would have on particular portions of the lizard’s habitat. *Id.* Therefore, in reading the analysis in Part II.C, one should consider the potential effect that the Ninth Circuit’s decision will have upon the precedential force of the District Court’s opinion.

<sup>215</sup> The flat-tailed horned lizard, *Phrynosoma mcallii*, “is a small lizard with horns on its head and camouflage-like coloring . . . . [It] is typically found in the desert areas of southwestern Arizona, southeastern California and northwestern Mexico.” *Id.* at \*2–\*3.

<sup>216</sup> *Id.* at \*2.

<sup>217</sup> *Id.* A category one designation means that, even though sufficient information exists to support a proposed rule to list the species, other species have a higher priority given available agency resources. *Id.*

and the filling of the Salton Sea,"<sup>218</sup> the large inland sea in southeastern California.<sup>219</sup> Additionally, over forty percent of the lizard's remaining habitat was on private property.<sup>220</sup>

In 1993, the FWS initiated a proposed rule to list the flat-tailed horned lizard as a threatened species under the ESA based on decreased habitat (and the high vulnerability of the remaining habitat), species population decline, and the threat posed by pesticides and drought threats.<sup>221</sup> The FWS was unable to come to a decision in time to meet the rulemaking deadline.<sup>222</sup> Instead, it formed the Rangewide Strategy Working Group (RSWG), composed of federal, state, and local agencies whose mission was "to formulate a plan to mitigate threats to the [lizard] population."<sup>223</sup> The RSWG completed the final plan, called the Conservation Agreement, in June 1997.<sup>224</sup> Meanwhile, the FWS reopened the comment on the proposed rule and on the Conservation Agreement.<sup>225</sup> However, in mid-July 1997, less than two months after signing the Conservation Agreement with state agencies, the FWS made a final determination to withdraw the proposed listing.<sup>226</sup>

## 2. *The Lizard Case*: Defenders of Wildlife v. Babbitt

Conservation groups sued the FWS seeking reconsideration of the decision not to list the lizard.<sup>227</sup> The FWS defended its decision on the grounds that the lizard did not seem to be in decline in its remaining habitat, that some currently existing threats were less serious than when the FWS first published the proposed rule, and that

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<sup>218</sup> *Id.* at \*3.

<sup>219</sup> See Scott M. Rennie, Comment, *Selenium in San Joaquin Valley Agricultural Drainage: A Major Toxic Threat to Fish and Wildlife Inadequately Addressed by the Central Valley Project Improvement Act*, 27 PAC. L.J. 303, 322 n.137 (1996).

<sup>220</sup> *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \* 3.

<sup>221</sup> See *id.* at \*3-\*4. Specifically, the factors were as follows:

First, [the] FWS found that certain parts of the [lizard's] habitat have been lost to human use, while the remaining habitat areas in the United States face various threats, including off-highway vehicle . . . use, geothermal development, sand and gravel operations, military maneuvers, construction of roads and utility corridors, and agricultural and urban development. Second, [the] FWS expressed concern that the species faced continued destruction of habitat and population declines. Finally, use of pesticides to control agricultural pests, as well as drought, further threatened possible negative effects on the [lizard] population.

*Id.*

<sup>222</sup> *Id.* at \*4.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at \*5.

<sup>225</sup> See *id.* at \*6, \*21.

<sup>226</sup> See *id.* at \*4-\*6. In fact, the District Court for the District of Arizona had to order the FWS to make a final determination in response to a suit charging that the FWS had missed a statutory deadline. *Id.* at \*6.

<sup>227</sup> See *id.* at \*7.

the federal and state agencies had adopted the Conservation Agreement.<sup>228</sup> The plaintiffs responded that there was no significant change in the status of the species between 1993, the time of the proposed rule to list the species, and 1997, when the FWS determined not to list the species.<sup>229</sup> The plaintiffs further argued that it was improper for the FWS to rely upon the untested Conservation Agreement.<sup>230</sup> Both parties moved for summary judgment: the FWS arguing that the data did not warrant a listing, and the plaintiffs arguing that the court should remand the case to the agency for a new determination on whether to list the lizard.<sup>231</sup>

In considering the case, the district court first stated the standard of review for evaluating the FWS's decision: "While the agency must show that it has considered relevant factors and followed the required procedures, if the court finds the agency has done so, the court may not substitute its [own] judgment on the merits for the agency's judgment."<sup>232</sup> The plaintiffs argued that the FWS's decision was not supported in the record, citing *Oregon Natural Resources Council v. Daley*<sup>233</sup> for the proposition that the FWS may not rely upon future or voluntary state conservation programs.<sup>234</sup> They also argued that the Conservation Agreement upon which FWS relied was "strikingly similar to prior management plans which proved ineffective."<sup>235</sup>

The court stated that its role is to first determine whether the FWS considered the proper statutory factors.<sup>236</sup> The court first disposed of the plaintiffs' claim that the FWS's decision was inconsistent with the record by concluding that the "FWS'[s] conclusion to not list the [lizard] as threatened was a reasonable interpretation of equivocal scientific evidence by agency experts that deserves deference in this case."<sup>237</sup>

The court then proceeded to the plaintiffs' second claim that the FWS may not rely upon the Conservation Agreement.<sup>238</sup> It characterized the fundamental flaw of the conservation agreement litigated in *Save Our Springs v. Babbitt*<sup>239</sup> as the lack of public comment upon the plan, rather than the unimplemented and unproven nature of the

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<sup>228</sup> See *id.* at \*6-\*7.

<sup>229</sup> *Id.* at \*7.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at \*7-\*8.

<sup>232</sup> *Id.* at \*9.

<sup>233</sup> 6 F. Supp. 2d 1139 (D. Or. 1998).

<sup>234</sup> *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \*10-\*11.

<sup>235</sup> *Id.* at \*11.

<sup>236</sup> See *id.*; see also text accompanying *supra* note 35 (delineating the factors considered in a listing determination under the ESA).

<sup>237</sup> *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \*17.

<sup>238</sup> *Id.* at \*18-\*23.

<sup>239</sup> 27 F. Supp. 2d 739 (W.D. Tex. 1997).



plan.<sup>240</sup> By reading *Save Our Springs* in this manner, the court could easily distinguish the instant case because, according to the court, the FWS had reopened the comment period to allow “public opinion and input on the Conservation Agreement” applicable to the lizard.<sup>241</sup>

The court did not limit itself to this interpretation of *Save Our Springs* to reach its result. It also specifically rejected the rationale of *Oregon Natural Resources Council v. Daley*.<sup>242</sup> It concluded that the ESA required no implementation time period for testing the efficacy of a plan before the FWS could consider such a plan,<sup>243</sup> and that even if it did, the Conservation Agreement had been in operation one month prior to the FWS’s decision.<sup>244</sup> Because the agencies executed the Conservation Agreement one month prior to the final determination, it was “operational” and “properly considered” in the court’s estimation.<sup>245</sup> The court based its analysis on the qualifications of the RSWG and a presumption that refusing to consider newly implemented plans would “discourage states from engaging in any conservation efforts at all.”<sup>246</sup> Instead, according to the court, the ESA encourages state and federal cooperation: “The ESA was not implemented to discourage states from taking measures to protect a species before it becomes technically or legally ‘necessary’ to list the species as threatened or endangered under ESA guidelines.”<sup>247</sup> Thus, the district court upheld on summary judgment the FWS determination not to list the flat-tailed horned lizard.<sup>248</sup>

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<sup>240</sup> See *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \*20–\*21.

<sup>241</sup> *Id.* at \*21.

<sup>242</sup> 6 F. Supp. 2d 1139 (D. Or. 1998); see *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \*22 (“This court does not find [*Oregon Natural Resources Council*] persuasive.”). Notably, the court could have read *Oregon Natural Resources Council* narrowly, as it did with *Save Our Springs*, by simply concluding that *Oregon Natural Resources Council*’s essential holding was that the NMFS relied upon an improper standard in determining not to list the Oregon Coast ESU. See *supra* notes 117–21 and accompanying text.

<sup>243</sup> See *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \*22.

<sup>244</sup> See *id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at \*23. But see *supra* note 150 (noting that citizens have “other reasons” to continue their conservation efforts).

<sup>247</sup> *Defenders of Wildlife*, 1999 U.S. Dist. LEXIS 10366, at \*24. Note that the court mischaracterizes the plaintiffs’ argument. The plaintiffs argue that the state formulated and executed the Conservation Agreement when it was already necessary to list the species. See *id.* at \*7. Therefore, adopting the plaintiffs’ proposed argument would not discourage states from acting *before* it becomes legally or technically necessary; instead it would prohibit the FWS from considering state action that is taken when it is already “technically or legally ‘necessary’ to list the species.” *Id.* at \*24.

<sup>248</sup> *Id.* at \*24. The court also rejected the argument that agency consideration of voluntary measures is improper by stating that “it is irrelevant whether the conservation agreement relied upon is mandatory or voluntary—as along [sic] as states attempt to make continuing conservation efforts, they may be considered by the FWS.” *Id.* at \*22.

D. Current Developments<sup>249</sup>

The trend toward adopting local- and state-based conservation plans continues throughout the nation. Because of this continuing trend, the need for clear requirements for these plans may become even greater in the future.

In California, the United States Marine Corps (USMC) has applied for permission from the FWS to exempt their bases from ESA requirements that would otherwise apply because of the presence of the Coastal California gnatcatcher,<sup>250</sup> the San Diego fairy shrimp,<sup>251</sup> the tidewater goby,<sup>252</sup> and the Arroyo southwestern toad<sup>253</sup> on the bases.<sup>254</sup> The USMC "is seeking to substitute its own conservation plans" instead of following the rules of the ESA.<sup>255</sup> Similarly, Washington State reacted to the series of listing decisions for the area's salmon by adopting legislation in June of 1999<sup>256</sup> that "authorizes establishment of a Salmon Recovery Funding Board that will fix criteria and allocate funds for 'salmon habitat projects' and 'salmon recovery activities.'"<sup>257</sup> Some other examples of state-based conservation programs are "the completed forestry agreement in Washington [S]tate; ongoing reviews of Oregon and California forestry practices; and development of coastal states' shoreline management programs."<sup>258</sup> In addition, the FWS has entered into an agreement with Oregon agencies to study the red-bellied Oregon spotted frog, a candidate for listing under the ESA.<sup>259</sup>

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<sup>249</sup> Rumors circulate about a case in Maine that challenges an agency's determination not to list a species in light of a recently adopted state plan. See Blumm & Corbin, *supra* note 63, at 588 & n.472 (mentioning case regarding a Maine plan to conserve Atlantic salmon that was challenged in the federal courts). Assuming such a case exists and is pending, it would provide a useful case study in addition to the cases discussed *supra* Part II.A-C.

<sup>250</sup> The Coastal California gnatcatcher, *Poliophtila californica californica*, is a bird native to the United States and Mexico. U.S. Fish & Wildlife Service, Species Information: Threatened and Endangered Animals and Plants, at <http://endangered.fws.gov/wildlife.html> (last updated July 9, 2001).

<sup>251</sup> The San Diego fairy shrimp, *Branchinecta sandiegonensis*, is a crustacean native to California. See *id.*

<sup>252</sup> The tidewater goby, *Eucyclogobius newberryi*, is a fish native to California. See *id.*

<sup>253</sup> The Arroyo toad, *Bufo microscaphus californicus*, is an amphibian native to California and Mexico. See *id.*

<sup>254</sup> See Seema Mehta, *Groups Demand that Navy Follow Rare Species Act*, L.A. TIMES (Orange County ed.), Sept. 14, 2000, at A3.

<sup>255</sup> *Id.*

<sup>256</sup> See William H. Rodgers, Jr., *What a Salmon Czar Might Hope for*, 74 WASH. L. REV. 511, 511-12 (1999).

<sup>257</sup> *Id.* at 512.

<sup>258</sup> Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units (ESUs), 65 Fed. Reg. 42,422, 42,424 (July 10, 2000) (to be codified at 50 C.F.R. pt. 223).

<sup>259</sup> See Alice Tallmadge, *Three Agencies Join to Study Spotted Frog*, OREGONIAN, July 27, 2000, at D14.

As a result of the continuing increase in collaborative efforts between agencies and states, court challenges to agency determinations not to list species because of these cooperative efforts will likely increase. Thus, the need to delineate the boundaries of acceptable state plans that may substitute for an ESA listing is clear. Without clear guidelines, state and agency collaborations will be inconsistent and the standards that courts set for these plans will send conflicting messages to other states considering the adoption of local plans. For example, Texas currently operates under a significantly different legal scheme than California.<sup>260</sup> Additionally, inconsistent results in the district courts send conflicting messages to the public, undermining the trust that constituents place in state-adopted local conservation plans and their support for the development of those plans.

### III

#### INTEGRATED REQUIREMENTS: THE CURRENT JUDICIAL LANDSCAPE FOR STATE AND LOCAL CONSERVATION AGREEMENTS TO PREEMPT THE ENDANGERED SPECIES ACT

This Part will discuss the various standards that courts have used to evaluate the sufficiency of agency determinations not to list species in the face of a locally adopted plan to conserve the species at a state level. It will further integrate those requirements into a proper standard, consistent with the ESA's purpose.

##### A. State and Local Conservation Plans in Light of the Purpose of the Endangered Species Act

The purpose of the ESA is to conserve species that are threatened with extinction and establish measures to enable the long-term survival of the species without continued ESA protections.<sup>261</sup> The methods that the ESA uses to carry out its purpose involve very specific limitations on both private and public actions that impact the continued survival of the species.<sup>262</sup> Courts must interpret the provisions of the ESA in light of Congress's clearly expressed purpose; where the statute is ambiguous, the court must defer to an agency's interpretation when that interpretation is based on a reasonable construction of

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<sup>260</sup> Compare *supra* Part II.B.2 (discussing Texas's legal scheme as exemplified by *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997), with *supra* Part II.C.2 (discussing California's legal scheme as exemplified by *Defenders of Wildlife v. Babbitt*, No. 97-CV-2330 TW, 1999 U.S. Dist. LEXIS 10366 (S.D. Cal. June 14, 1999), *rev'd sub nom*, *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

<sup>261</sup> See discussion *supra* Part I.A.

<sup>262</sup> *Id.*

the statute.<sup>263</sup> In fact, in discussing cooperation between the agencies and the states, the ESA specifically authorizes cooperative agreements only when the state has adopted a scheme consistent with the purpose and policies of the ESA.<sup>264</sup> The general rule that the courts should allow agencies to resolve statutory ambiguity consistently with the purpose of the ESA<sup>265</sup> will underlie the discussion in this Part and guide this Note's conclusions regarding the proper standard courts should use in evaluating agency determinations not to list a species based upon recently adopted state conservation plans.

## B. Time Limits or No Time Limits?

### 1. *Must the State Have Already Implemented the Plan?*

The three decisions discussed in Part II—*Oregon Natural Resources Council v. Daley*,<sup>266</sup> *Save Our Springs v. Babbitt*,<sup>267</sup> and *Defenders of Wildlife*<sup>268</sup>—each come to a different conclusion about whether the state must have adopted and implemented the local plan at issue, and if so, how long the plan must have been in operation—in order for an agency to rely upon that plan in determining not to list a species.<sup>269</sup> The District Court for the Western District of Texas concluded that the state must have adopted the Conservation Agreement and implemented it for at least two years before the FWS could rely upon it in determining not to list the species.<sup>270</sup> However, the District Court for the Southern District of California entirely rejected this reasoning, dispensing with the requirement of an implementation time period for a plan before an agency could rely upon that plan to determine not to list a species.<sup>271</sup> The Oregon District Court addressed this question without adopting either of the more extreme positions taken by the Texas and California courts.<sup>272</sup>

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<sup>263</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

<sup>264</sup> See 16 U.S.C. § 1535(c)(1)(B) (1994); *supra* note 206.

<sup>265</sup> See *Chevron*, 467 U.S. at 862–63.

<sup>266</sup> 6 F. Supp. 2d 1139 (D. Or. 1998); see also discussion *supra* Part II.A (detailing an Oregon plan to conserve salmon and the challenges it faced in court).

<sup>267</sup> 27 F. Supp. 2d 739 (W.D. Tex. 1997), *aff'd on other grounds*, 115 F.3d 346 (5th Cir. 1997); see also discussion *supra* Part II.B (detailing a Texas plan to conserve the Barton Springs salamander and the challenges it faced in court).

<sup>268</sup> No. 97-CV-2330 TW, 1999 U.S. Dist. LEXIS 10366 (S.D. Cal. June 14, 1999); see also discussion *supra* Part II.C (detailing a California plan to conserve the flat-tailed horned lizard and the challenges it faced in court).

<sup>269</sup> See discussion *supra* Part II.

<sup>270</sup> See discussion *supra* Part II.B.2.

<sup>271</sup> See discussion *supra* Part II.C.2.

<sup>272</sup> See discussion *supra* Part II.A.2. The Oregon District Court prohibited agency reliance on an unimplemented, voluntary, and unproven plan, but did not specify a definite implementation time period. *Id.*

A determination of the proper standard for which state actions an agency may consider must begin with the ESA itself, which includes several provisions relevant to this question.<sup>273</sup> For example, the ESA provides that the agencies must take into account "efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species."<sup>274</sup> Although the Oregon District Court is correct in looking to the tense of the phrase to conclude that this phrase means present and not future efforts,<sup>275</sup> this phrase does not provide support for the conclusion of the Western District of Texas that the plan must have been in effect for the past two years.<sup>276</sup> In fact, this clause may support the conclusion of the Southern District of California that the agency could consider any conservation efforts<sup>277</sup> because a plan that the state only recently adopted is still an "effort" to protect the species.

One must use caution in interpreting the term "efforts" in this clause because the same clause, after using the term "efforts," lists several types of conservation practices and then states, "*or other conservation practices.*"<sup>278</sup> Although the California district court may be correct in arguing that a recently adopted state plan is an "effort" to protect a species,<sup>279</sup> one should interpret the term "effort" in this context consistently with the rest of the clause.<sup>280</sup> In this case, the clause as a whole suggests that "efforts" in this context must be some sort of conservation practice. A recently adopted plan, if its provisions are not implemented, does not represent a conservation practice as that term is used in the statute using traditional tools of statutory construction.

However, this clause is not the only provision in the ESA that could guide the analysis. The ESA states that agencies must "cooper-

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<sup>273</sup> See discussion *supra* Part I.A.

<sup>274</sup> 16 U.S.C. § 1533(b)(1)(A) (1994).

<sup>275</sup> See *supra* text accompanying note 136; see, e.g., Sharone Levy, Note, *Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995*, 86 IOWA L. REV. 361, 382-83 (2000) (discussing the use of a term's tense with traditional rules of statutory construction).

<sup>276</sup> See *supra* text accompanying note 195.

<sup>277</sup> See *supra* note 243 and accompanying text.

<sup>278</sup> 16 U.S.C. § 1533(b)(1)(A) (1994) (emphasis added).

<sup>279</sup> See *Defenders of Wildlife v. Babbitt*, No. 97-CV-2330 TW, 1999 U.S. Dist. LEXIS 10366, at \*22 (S.D. Cal. June 14, 1999), *rev'd sub nom.*, *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

<sup>280</sup> Two complementary canons of statutory construction require this method of interpretation when faced with a statute containing a list of terms, including some ambiguous terms. First, *noscitur a sociis* requires that words clustered together in the statute should be interpreted as having similar meanings. Payson R. Peabody, Comment, *Taming CERCLA: A Proposal to Resolve the Trustee "Owner" Liability Quandary*, 8 ADMIN. L.J. AM. U. 405, 441 n.189 (1994). Second, *eiusdem generis* requires that general terms, such as "other conservation practices" in this case, should be interpreted consistent with the specific terms they follow. *Id.*

ate to the maximum extent practicable with the States.”<sup>281</sup> The ESA lists the types of cooperation allowed and includes “enter[ing] into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species.”<sup>282</sup> This language provides additional support for the theory behind the conclusion of the Western District of Texas that a state must have implemented the plan for at least two years.<sup>283</sup> The language “establishes *and maintains*” suggests more than a program that the state has recently adopted in response to agency action; it suggests instead a long-term program that the state has actively followed. The implication from this language is that this type of ongoing, long-term plan is a prerequisite to any cooperative agreement between the state and the agency in charge.<sup>284</sup>

The Southern District of California incorrectly used one of the five statutory factors that the ESA requires: the inadequacy of existing regulatory mechanisms. The underlying assumption of the Southern District of California’s conclusion is that, even if the biological factors support a listing, the agency may consider the “inadequacy of existing regulatory mechanisms” factor<sup>285</sup> and conclude that the recently adopted state plan, even if unimplemented, was an “adequate” regulatory mechanism.<sup>286</sup> However, the negative phrasing of the “inadequacy of existing regulatory mechanisms” factor is significant. Just because the agencies must weigh in the balance *inadequate* existing regulatory mechanisms when deciding in favor of a listing does not mean that *adequate* regulatory mechanisms can weigh strongly against a listing.

The obvious response to this argument is that the ESA allows, and in fact requires, the agencies to consider other state efforts.<sup>287</sup> This response is flawed, as discussed above, because the term “efforts”—properly interpreted in the context—means conservation practices, not recently adopted state plans.<sup>288</sup>

A second response to this argument concerns the ESA’s grant of authority to the agencies to determine whether, on the basis of the five ESA factors,<sup>289</sup> the species is *likely* to become endangered in the

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<sup>281</sup> See 16 U.S.C. § 1535(a) (1994).

<sup>282</sup> *Id.* § 1535(c)(1).

<sup>283</sup> See *supra* text accompanying note 195.

<sup>284</sup> See 16 U.S.C. § 1535(c). Additionally, a strong argument exists that this clause does not authorize cooperative agreements with states that do not involve a species that is already listed under the ESA. See *supra* note 50.

<sup>285</sup> 16 U.S.C. § 1533(a)(1)(D).

<sup>286</sup> See *supra* text accompanying note 243.

<sup>287</sup> See *supra* text accompanying notes 274, 277.

<sup>288</sup> See *supra* text accompanying notes 278–80.

<sup>289</sup> See 16 U.S.C. § 1533(a)(1).

foreseeable future.<sup>290</sup> One could easily interpret the ESA as granting the agencies not only the authority to use their judgment to forecast the likely biological factors affecting the species in the future, but also to forecast the likely effects of a recently adopted state plan. Specifically, the first ESA factor is "the present or threatened destruction, modification, or curtailment of [a species's] habitat or range."<sup>291</sup> In order to forecast the potential for future, "threatened" destruction of the species's habitat or range, the agencies must have the discretion to consider the potential effects of a recently adopted state plan, which includes future, and therefore unimplemented, measures.<sup>292</sup> According to one commentator, "all 'efforts' a state might make to protect a species should be relevant to the analysis."<sup>293</sup>

However, there is a fundamental distinction between forecasting species survival trends based on physical and biological facts<sup>294</sup> supported by data and forecasting the effect of plans and measures that states have not previously used or tested. As the Oregon District Court stated, the effects of unimplemented actions are "necessarily speculative."<sup>295</sup>

*Friends of the Wild Swan, Inc. v. United States Fish and Wildlife Service*<sup>296</sup> addresses the question of whether the agency can consider unimplemented plans of other federal agencies in the context of an ESA listing of bull trout. One of the issues in this case was whether the FWS could consider "ongoing management changes," including a new federal forest plan, in refusing to list the bull trout.<sup>297</sup> The court stated:

These management changes were for the future, with uncertain effect on the bull trout species. However, as [the] FWS has acknowledged, it is required "to base listing decisions upon an analysis of *existing* threats." Thus, [the] FWS determines for listing decisions whether a species "is an endangered species or threatened species" based on the *current* status of the species. Moreover, it must make its listing determination "solely on the basis of the best scientific and commercial [data] available" to it. It cannot rely upon its own speculations as to the future effects of another [federal] agency's management plans to put off listing a species, and such reliance

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<sup>290</sup> See *id.* § 1532(20).

<sup>291</sup> See *id.* § 1533(a)(1)(A).

<sup>292</sup> See Gregoire & Costello, *supra* note 19, at 716.

<sup>293</sup> *Id.*

<sup>294</sup> Examples of such biological facts include natural cycles of ocean temperature and necessary spawner-to-spawner ratios.

<sup>295</sup> See *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998).

<sup>296</sup> 945 F. Supp. 1388 (D. Or. 1996).

<sup>297</sup> *Id.* at 1398.

here again requires a finding that the decision was arbitrary and capricious.<sup>298</sup>

The FWS had implied in its findings that without the new management changes, the threats to the bull trout were high, but with them, the threats were only moderate.<sup>299</sup> The court concluded that the "FWS . . . relied on factors that are contrary both to the provisions and purposes of the ESA and to its own internal policies."<sup>300</sup>

In the face of these inconsistent ESA interpretations, the ESA's purpose of protecting species from the danger of extinction<sup>301</sup> may provide guidance. The Southern District of California's conclusion that the ESA requires no implementation period at all<sup>302</sup> is relatively inconsistent with the structure of the ESA as well as its purpose. The ESA itself provides for a very specific timeline for the agency decision-making process, as the District Court of Oregon suggested.<sup>303</sup> Allowing the agencies to accept unimplemented actions, with the caveat that if the state plans do not work properly the agency will then list the species, essentially places an additional time period into the listing process that the ESA does not authorize. It only delays a decision to list using a mechanism that the ESA—which otherwise contains very strict guidelines for the timing of listing decisions—does not include or allow.<sup>304</sup> It also essentially allows the agency to wait and see if planned, but previously unimplemented, state actions will work, even though the biological factors justify listing the species as either threatened or endangered and the currently existing regulatory mechanisms are inadequate.

In cases of doubt the agency should err on the side of caution and list the species, establish a cooperative agreement with the state once it develops a plan that is an effective substitute for ESA protections, and then utilize the ESA delisting procedures if the species recovers sufficiently to warrant that action.<sup>305</sup>

## 2. *Is the Two Year Requirement Really Necessary?*

The conclusion that the ESA requires some period of implementation prior to the agency relying upon the plan, however, does not automatically lead one to adopt the conclusion of the Western District of Texas requiring two years of implementation.<sup>306</sup> One source of

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<sup>298</sup> *Id.* (citations omitted).

<sup>299</sup> *Id.* at 1400.

<sup>300</sup> *Id.*

<sup>301</sup> See *supra* text accompanying notes 30–33.

<sup>302</sup> See discussion *supra* Part II.C.2.

<sup>303</sup> See *supra* text accompanying notes 122–25.

<sup>304</sup> See *supra* text accompanying note 125.

<sup>305</sup> See 16 U.S.C. § 1533(c)(2) (1994); *supra* notes 206–08 and accompanying text.

<sup>306</sup> See *supra* text accompanying note 195.



criticism against this court's conclusion may be the arbitrary nature of such line drawing—a common problem courts face when setting such standards. However, the true question here is whether a federal district court should set this standard at all.

Although the ESA's provisions and its purpose likely support the conclusion that the ESA requires some implementation period, these provisions do not specify or support one particular time period. A hypothetical may reveal the harsh consequences of a mandatory implementation period. Imagine that a species is newly discovered and seems to be endangered. In response, the state in which the species lives takes immediate action, develops a strong plan to conserve and protect the species, and begins to implement the plan. Should the agency in charge of the listing ignore such a plan? A two-year requirement in this case is overly burdensome to the state and restricts the agency's decisionmaking, forcing it to commit resources to a listing that is likely not necessary.

Another hypothetical may help to illustrate the other end of the spectrum. Imagine a case in which the threats to a species have been evident for some time and the agency in charge has taken action over the course of several decades, gradually upgrading the species's designation from category two to category one.<sup>307</sup> Suppose that the state, during this entire period, has not taken any effective action to protect the species, despite specific findings by the agency regarding the particular inadequacies in the existing state regulatory mechanisms. In this case, should the agency consider the state's species protection plan enacted during or just subsequent to the agency promulgation of a proposed rule to list the species as either threatened or endangered?

A more sensible standard would look to the promptness of state action compared to the known threats against the species and to the effectiveness of the state plan compared to a federal listing. This approach is faithful to both the explicit language of the ESA and its purpose, while allowing courts (and agencies and states) the flexibility to consider plans that a rigid implementation period requirement would otherwise preclude.

### C. Enforceable or Voluntary?

Again, one must turn to the purpose of the ESA in first evaluating whether a state plan must be enforceable before an agency can rely upon it in its decision not to list a species. The critical question must be whether the state plan is an appropriate substitute for an ESA list-

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<sup>307</sup> See *supra* notes 167 and 217 for an explanation of these terms.

ing—that is, whether it will be effective in carrying out the ESA's purpose of preventing extinction.

This analysis also requires an examination of the language of the ESA, which grants an agency permission "to enter into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species."<sup>308</sup> While "maintains" was the key provision for the timing analysis,<sup>309</sup> in determining whether or not a state plan must be enforceable, the key provision is that the plan must be "adequate."

The key to the analysis, then, is whether voluntary measures can meet the adequacy requirement contained in the ESA. In rejecting the NMFS's final rule not to list based on the state salmon protection initiative, the District Court of Oregon placed great weight on the fact that the initiative created no obligation to carry out the actions promised.<sup>310</sup> While such voluntary measures may be appropriate when the biological status of the species does not yet rise to a level that warrants a threatened or endangered listing for the species,<sup>311</sup> they may not be consistent with the structure and purpose of the ESA. The ESA itself does not provide room for voluntary actions once an agency has listed a species as threatened or endangered because the ESA's overriding concern is the preservation of a species threatened with extinction.<sup>312</sup> Because agency listings take time, failure of the state to follow the voluntary measures could endanger the survival of the species before the agency could act. The Western District of Texas placed emphasis on the ability (or lack thereof) of the agencies to forecast future trends premised upon voluntary actions.<sup>313</sup> Finally, the presence of voluntary measures in a state plan suggests that the state either has not marshaled the necessary political support to actually make some of the hard decisions involved in protecting the species, or that the state does not want to bind itself and its citizens to taking actions necessary to protect the species.<sup>314</sup>

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<sup>308</sup> 16 U.S.C. § 1535(c)(1) (1994).

<sup>309</sup> See *supra* text accompanying notes 282–84.

<sup>310</sup> See *Or. Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155, 1158 (D. Or. 1998); *supra* text accompanying notes 139–42.

<sup>311</sup> For example, those species whose status warrants inclusion in programs such as the "Safe Harbor Policy" and the "No Surprises Policy." See Kubasek et al., *supra* note 4, at 10,726–27; discussion *supra* Part I.B.

<sup>312</sup> See discussion *supra* Part I.A.

<sup>313</sup> See *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 744 (W.D. Tex. 1997); discussion *supra* Part II.B.2.

<sup>314</sup> Additionally, an interpretation of the ESA that allows consideration of voluntary measures is inconsistent with previous agency determinations. For example, when determining whether to list the Barton Spring salamander, the FWS discussed the voluntary nature of Austin's pool cleaning measures and refused to rely upon them. See *supra* notes 177–78 and accompanying text.

There is a strong counterargument that the language of the ESA itself authorizes consideration of voluntary measures because the agencies must consider any "efforts" states or foreign nations make to protect a species.<sup>315</sup> However, the expansion of the term "efforts" later in the clause suggests that "efforts" are "conservation practices."<sup>316</sup> As two commentators have noted:

The "conservation practices" the statute gives as examples of such efforts—predator control and protection of habitat and food supply—are not limited to regulatory programs. Such practices may include nonregulatory efforts such as appropriate management of state-owned lands, disease-control research, purchase of conservation easements, and campaigns to encourage conservation-oriented policies and practices.<sup>317</sup>

Additionally, the agencies must consider "the present or threatened destruction, modification, or curtailment of [the species's] habitat or range."<sup>318</sup> Therefore, the argument goes, the agencies cannot analyze the potential for threatened destruction of habitat unless the ESA allows them to consider state plans bearing on that factor.<sup>319</sup>

In light of the statute's ambiguity, the proper interpretation is one that is more consistent with the purpose of the ESA.<sup>320</sup> Agencies should act consistently with their own interpretations and not consider voluntary actions when determining whether or not to list a species.

#### D. Lessons Learned

One can learn several lessons from the current trend toward adopting state-specific measures designed to substitute for a species listing under the ESA. First, "state conservation plans will not substitute for species listings unless they are enforceable."<sup>321</sup> In a similar vein, courts may not accept voluntary measures because they are unenforceable, and any measures adopted must be binding upon the state or local government itself.<sup>322</sup>

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<sup>315</sup> See discussion *supra* Part III.B.1.

<sup>316</sup> See 16 U.S.C. § 1533(b)(1)(A) (1994).

<sup>317</sup> See Gregoire & Costello, *supra* note 19, at 716.

<sup>318</sup> See 16 U.S.C. § 1533(a)(1)(A) (1994).

<sup>319</sup> See Gregoire & Costello, *supra* note 19, at 716.

<sup>320</sup> See, e.g., Levy, *supra* note 275, at 382–83 (discussing the use of a canon of statutory construction that requires interpretation of a clause consistent with the purpose and context of the statute as a whole); Peabody, *supra* note 280, at 441 n.189 (discussing canon of construction that "court[s] should look to the whole law, its object and policy").

<sup>321</sup> Blumm & Corbin, *supra* note 63, at 588.

<sup>322</sup> See *supra* text accompanying notes 139–46.

Second, agencies may not rely upon unimplemented plans as an excuse to refuse to list a species that otherwise qualifies.<sup>323</sup> In fact, the court in *Save Our Springs* suggested that a state must have enacted and implemented a plan for at least two years before courts will consider it sufficient.<sup>324</sup> Although the language of the ESA does not support such a bright-line rule, other jurisdictions may find this court's reasoning persuasive. Alternatively, states and agencies may presume such a rule to avoid reversal of their decisions and plans. In any case, "until enough of [a] state plan's measures reach actual results that effectively remove threats to a species, the [agencies] should not rely on the plan in a listing decision."<sup>325</sup>

Third, based on both the text of the ESA<sup>326</sup> and decisions of the courts,<sup>327</sup> the local or state plan must rely upon scientific evidence so that there is a trustworthy basis for presuming that the plan will effectively protect the species.

Fourth, the state plan should provide protections consistent with the standards the ESA requires. Language in both *Biodiversity Legal Foundation*<sup>328</sup> and *Southwest Center for Biological Diversity*<sup>329</sup> supports this conclusion. The court stated in these cases that, if the United States Forest Service had an existing plan that would protect the species at issue "to the standards required by the ESA, then [the] FWS would not have to enact its own plan."<sup>330</sup> By implication, the same reasoning applies to a state plan, especially because the ESA explicitly instructs the agencies to consider whether the state's existing regulatory mechanisms are inadequate.<sup>331</sup> Additionally, the ESA's instruction to enter cooperative agreements with states that establish and maintain plans

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<sup>323</sup> See *Friends of the Wild Swan, Inc. v. United States Fish and Wildlife Serv.*, 945 F. Supp. 1388, 1398-99 (D.Or. 1996). Other cases have reached this conclusion as well. In both *Biodiversity Legal Foundation v. Babbitt*, 943 F. Supp. 23 (D.D.C. 1996), and *Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 49 (D.D.C. 1996), the District Court for the District of Columbia concluded that it was impermissible for the FWS to depend upon promises of future action by the United States Forest Service (USFS) in deciding not to list a species otherwise qualified under the ESA. See *Biodiversity Legal Found.*, 943 F. Supp. at 26; *Southwest Ctr. for Biological Diversity*, 939 F. Supp. at 52. In *Southwest Center for Biological Diversity*, the FWS refused to list a goshawk in Alaska's Tongass National Forest based on the USFS's promise to manage the forest to "ensure goshawk habitat conservation." 939 F. Supp. at 51 (citing FWS memorandum). In *Biodiversity Legal Foundation*, the FWS made a similar decision about the Alexander Archipelago wolf. See 943 F. Supp. at 25.

<sup>324</sup> See *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 748 (W.D. Tex. 1997); discussion *supra* Part II.B.2.

<sup>325</sup> Golightly, *supra* note 26, at 443.

<sup>326</sup> E.g., 16 U.S.C. § 1533(b)(1)(A) (1994); see discussion *supra* Part I.A.

<sup>327</sup> See discussion *supra* Part II.A-C.

<sup>328</sup> 943 F. Supp. at 26.

<sup>329</sup> 939 F. Supp. at 49, 52.

<sup>330</sup> *Biodiversity Legal Found.*, 943 F. Supp. at 26; *Southwest Ctr. for Biological Diversity*, 939 F. Supp. at 52.

<sup>331</sup> 16 U.S.C. § 1533(a)(1)(D).

consistent with the purpose and policies of the ESA further supports this conclusion.<sup>332</sup>

The combination of these four requirements may prevent some states from adopting effective plans that the courts will accept. However, these requirements may also prevent states from adopting inadequate and purely reactionary plans in order to prevent a listing. If courts broadly accept the timing requirements from *Save Our Springs*, the sheer burden of the timing requirements would prevent court-sanctioned acceptance of plans that states have adopted in a reactionary manner.<sup>333</sup> This is because the state would have to have adopted and implemented the plan for two years prior to a listing decision in order for the plan to qualify.<sup>334</sup> The two likely end results are as follows: First, courts will probably accept fewer local plans as substitutes for an ESA listing. Second, however, those plans that satisfy the more stringent requirements are more likely to be strong, effective measures to prevent extinction of species. These plans will likely be as stringent as the ESA itself.

#### CONCLUSION

A broad overview of agency and court reactions to state conservation plans has shown that substantial disagreement remains regarding the standards courts should apply when considering whether agencies may rely upon recently adopted state conservation plans in determining not to list a species. In light of the continuing trend toward adopting such plans in the face of an ESA listing, the need for clear standards and boundaries is clear. This Note has analyzed this problem in light of the purposes and policies of the ESA.

Although the language and purpose of the ESA suggest that the state must already have implemented its actions at the time of the agency decision, this Note suggests that courts and agencies should not impose an inflexible or nonexistent standard to determine the length of the necessary implementation period. Instead, the standard should be flexible, based upon the apparent threats to the species, how long these threats have been apparent, and the likelihood that the plan will be an effective substitute for ESA protections. The measures upon which agencies rely in making their determinations must be enforceable, not voluntary, and must be consistent with the purpose of the ESA. This standard would allow states that act promptly in the face of threats to a species to put forth their plans as effective alternatives to an ESA listing. On the other hand, it would prevent

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<sup>332</sup> See *id.* § 1535(c)(1).

<sup>333</sup> However, the two-year requirement may also exclude plans that should not be excluded. See discussion *supra* Part III.B.2.

<sup>334</sup> See *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 748 (W.D. Tex. 1997).

agencies and courts from considering purely reactionary plans and force them to rely upon other ESA mechanisms, such as the delisting procedures, if the plans later prove to be effective in eliminating threats to the species.